THE

DUTY

AND

OFFICE

OF

EXECUTORS.

BY AN OLD PRACTITIONER IN THE LAW.

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THE OFFICE and DUTY OF EXECUTORS.

THE Chief buſineſs of executors, may in effect be reduced to three heads, *viz.*

Their *being*, Their *having*, Their *doing*.

By the firſt, I intend their creation or conſtitution, with the incidents thereto. By the ſecond, their intereſt, fruition or poſſeſſion. By the third, their managing and execution of their office. This laſt, being the moſt eſſential, is the chief aim of theſe diſcourſes; but neceſſarily it muſt have ſome ingredients, ſome concomitants, and ſome conſequents.

To come to the head firſt ſtated, wherein we will conſider theſe ſix things, *viz.*

Whether an executor and a will be ſuch relatives, that one cannot be without the other; and therein of the ſeveral kinds of wills.

How, and by what words, an executor may be made and created.

How he may be in ſpecial manner (different from the general) faſhioned, limited or qualified.

Who may make or be made an executor, and who not.

What one may give or bequeath by will, what not.

How a will or executor, once made, may be unmade, and what ſhall amount thereunto, *viz.* to a revocation total or partial, what to a new publication.

Of the Relation between a Will and an Executor.

As to the firſt, the very name of executor purports, in the general, one that is to execute ſomewhat, or to whom the execution of ſomewhat is committed, or recommended. In this particular therefore, an executor of a will muſt needs be ſuch an one to whom the execution and performance of another man's will after his death is commended, or committed: or who is conſtituted and authorized by the teſtator or will-maker, to do him that friendly office. Hence it follows neceſſarily, that a will is the only bed wherein an executor can be begotten or conceived, for where no will is, there can be no executor. And this is ſo conſpicuous and evident to every low capacity, that it needs no proof nor illuſtration. On the other ſide, though much be written in name of a will, many legacies bequeathed, and many things appointed to be done: yet if no executor be named, here is no will; for theſe two be ſo relative and reciprocal, as that one cannot be without the other; if no will, no executor; if no executor, no will.

Here two cautions are to be obſerved: that a man's mind, will and intent, touching the diſpoſition of his goods, being declared, although for want of naming an executor he die inteſtate, ſo as adminiſtration is to be committed: for that here is not only an inchoation or inception of a teſtament, but ſo far a progreſſion therein as *teſtatio mentis*, that is, the manifeſtation of the party deceaſed and owner of goods; therefore this mind and intention of the inteſtate being notified and made known to the judge, who is to commit adminiſtration, is uſually annexed (as I take it) to the letters of adminiſtration, and meet ſo to be, as a direction for and to the adminiſtrator, as well as the will fully and perfectly made, but refuſed to be proved by the executor, which is uſual.

Another caution is, that where a man ſeiſed of land in fee-ſimple, diſpoſes the ſame, or part thereof, by his will in writing, this ſtandeth good for the whole or part, according to the difference of tenure, although no executor be named; ſo as the party dieth inteſtate, and adminiſtration is to be committed as touching his goods, and yet hath a will as touching his lands.

This may ſeem ſtrange, but the reaſon thereof is an act of parliament, enabling to diſpoſe of land by will in writing. For that land is not properly teſtamentary, neither hath the executor (if any be) any thing to do or intermeddle therewith; and therefore is the making or not making of an executor nothing pertinent to the validity or invalidity of this deviſe or diſpoſition of land by will. So as, though where there is not *teſtatio mentis*, there is not *teſtamentum*; yet may there be the firſt without the latter.

Have

Having ſeen that bequeſts of legacies without making of executors, doth not amount to a will, let us now conſider, whether the ſole making of executors in the name of a will, without giving any legacy, or appointing any thing to be done by his executors? Whether, I ſay, this be or amount unto a will, or not? Since here upon the matter nothing is willed, and conſequently nothing reſts to be executed by the executors, whoſe office, as hath been ſaid, is to execute the will, mind, and intent of their teſtator; and *Ubi non eſt teſtatio mentis, non eſt teſtamentum*, ſaith the *canoniſt*.

In anſwer hereunto, confeſſing that indeed to be the office of an executor, I yet conceive confidently, that, in the caſe above put, there is a good will, and as a will it is to be proved and approved, for theſe reaſons: firſt, for that the main and principal part of an executor's office, and that which moſt concerns the teſtator, is the payment of his debts. Now, who knows not, but that the very making of an executor, is the conſtituting of ſuch a perſon, who is to pay all debts; and for that cauſe and end, principally, is to have and enjoy all the goods and chattels of the teſtator, and all ſums of money to him owing; as the naming of *A.* and *B.* executors, is by implication a gift, or donation to them of all the goods, chattels, credits and perſonal eſtate of the teſtator, and the laying upon them an obligation to pay all his debts, and making them ſubject to every man's ſuit and action for the ſame. And if the law ſpeaks thus much ſenſe, *Quod neceſſario ſubintelligitur, non deeſt*, What need then the party expreſs it in his will? If he had willed more than this, as to have given this or that in way of legacy, it had been needful for him ſo to have ſet down in his will, but there is no mere neceſſity that every man ſhould give legacies; the eſtates of many will not do more than pay their debts, nor oft times ſo much, ſo as if they ſhould give any legacy, it muſt be a dead and void gift. And ſuppoſe a man have much more, and intendeth all to his wife, brother or ſiſter, or other friend, his debts being by ſuch perſon paid, ſince the very making of that party executor, without any more, amounteth to thus much, and effecteth this, what needeth then more words? *Fruſtra ſit per plura, quod fieri poteſt per pauciora.* Nor is *teſtatio mentis* here wanting, ſince the teſtator hath made known who ſhould have the adminiſtration of his goods for payment of his debts, and it is to be preſumed he had no more ſpecial will, ſince he did not declare more, but left his executor further to have and to do, *prout lex poſtulat*: and who can ſay, here is nothing to execute. Is the ſuing for and collecting of debts due to the teſtator, and the payment of debts owing by him, nothing? It is rather, *in hoc negotio*, the *unum neceſſarium.* Beſides, the making of an executor is a deſignment of a perſon to be the teſtator's aſſignee, to whom and by whom divers things may be feaſible by virtue of covenants, bonds, or other aſſurances, as after, where we come to ſhew how the executor repreſents the perſon of the teſtator, will appear.

Of the Kinds of Wills.

Wills are of two kinds, or may be two ways made, *viz.* either by writing or *nuncupative*; that is, by words not put in writing, during the teſtator's life; for after the teſtator's death, this *verbal* will muſt be reduced to writing, and have the ſeal of the ordinary, or judge ſpiritual, affixed, and then is it as effectual, and of as good validity, as if it had been in writing in the teſtator's life-time; and ſo doth the common law allow and approve thereof. But I adviſe all to make wills by writing, and not to leave them to the doubtful fidelity or ſlippery memory of witneſſes: for, as of leaſes parole hath been ſaid, that they are leaſes perjured, or of perjury.

So of wills parole may be feared. Beſides, many times a man doth ſpeak and declare this or that, as part of his will, which his wife, child, or friend diſſwading, he letteh that purpoſe and part of will to fall, and departs from it: yet witneſſes, wiſhing it to ſtand, will perhaps affirm it as part of the will. As for a will, gift and diſpoſition of land of inheritance, if it be not fully written before the death of the teſtator or donor, ſo far at leaſt as concerns the diſpoſition of land, it cannot be for that part made good, by reducing it to writing after his death, as for goods and chattels it may. Yet if it be written before the death of the teſtator, though it never be brought to him, or read to him, after the writing thereof, it is good enough; and that not only for land, as in the caſe in King *Ed.* 6. his time was, but alſo for goods and chattels, ſo as there be an executor named. But whether ſhall we ſay, that this is a will *nuncupative* or in writing? I think, that this is a will in writing, and not verbal only, though it want ſubſcribing; for we know that many cannot write their names, but only marks. Suppoſe one wants hands and cannot write ſo much as his name, yet doubtleſs this man may make a will in writing, that being written by his direction, as his will which he dictated: nor is the ſubſcribing of the name of the maker any eſſential part of a deed, much leſs of a will, which needs not ſealing as a deed doth. Put the caſe on the other ſide, that many bequeſts or legacies be named in a will, and many things expreſſed to be done, but no executor is named in the writing, only by word of mouth, *A.* and *B.* be named executors. This I think confidently is no will in writing, but *nuncupative* only; for that one eſſential part of the will, *viz.* the making of executors, is wanting in the writing. The appointing of him executor, who is named in a note left with *A. B.* is no ſufficient making of an executor.

A *nuncupative* will properly hath place when one, ſuddenly taken with violent ſickneſs, dare not ſtay the writing of his will, for fear of preven-

prevention by death; and therefore prays his curate and others to witneſs what his will is.

Note. To a will not written, there muſt be ſeven witneſſes, and ſuch as come not by chance, but are eſpecially called for that purpoſe.

What ſhall amount to making one Executor, or what Words are requiſite thereunto.

Having made it appear, that the being of an executor is an eſſential part of a will, and ſo *de eſſe*, and not *bene eſſe* only, of a will or teſtament,

Let us now ſee firſt by what words an executor may be made. Secondly, *de modo*, in what manner it may be done. How the power and authority of executors may be limited or divided.

As to the firſt, though one do not expreſsly, by will, name or appoint any to be executor, yet if, by any words of circumlocution, he recommend or commit, to one or more, the charge and office which pertains to an executor, it amounts to as much as the ordaining or conſtituting of him or them to be executors. As if he declare by his will that *A. B.* ſhall have his goods after his death to pay his debts, and otherwiſe to diſpoſe at his pleaſure, or to that effect; by this is *A. B.* made executor, as was conceived by the judges. It has been long held, that if one does only will that *A. B.* ſhall have the adminiſtration of his goods, he is thereby made executor.

Where an infant was executor, and *A.* and *B.* overſeers, with this, that they ſhould have the rule and diſpoſition of his goods, and payment and receipt of debts, until the full age of the infant; by this were they held to be executors in the mean time.

If *A.* be made executor, and the teſtator after in his will expreſſeth that *B.* ſhall adminiſter alſo with him, and in aid of him. Here *B.* is an executor as well as *A.* and if *A.* refuſe, *B.* alone may prove the will as executor; notwithſtanding it be only ſaid, that he ſhall adminiſter with *A.* and in aid of him.

Thus many ways, and by divers words of implication, one may be made executor, although not expreſsly ſo named by the will. But if *A.* be made executor, and *B.* a coadjutor, without more, he is not by this an executor with *A.* as in *H.* 6. was held. Nor hath ſuch coadjutor or an overſeer any power to adminiſter or intermeddle, otherwiſe than to counſel, perſwade and adviſe. Yet I think he may, and in conſcience ſhould do ſo; and if that will not prevail to rectify

negli-

negligences, or miſcarriages in executors, he ſhall well perform the truſt repoſed in him, if he complain in the ſpiritual court, or court of conſcience; and it is reaſouable, I think, that, ſo doing upon juſt cauſe, his charges be borne out of the teſtator's eſtate, or the executor's purſe, who otherwiſe would not be reformed.

How an Executor, or his Executorſhip, may be limited or qualified in ſpecial Manner, different from the general.

Let us ſee how the making of an executor may be ſpecially qualified. And firſt, the time may be limited, when he ſhall begin to be executor, and that either certainly, or with ſome reference to contingency. Secondly, the creation may be conditional. Thirdly, it may be partial or dividedly, and not entirely.

As to the firſt, one may appoint *Io. At.* to be his executor a year or more time after his death, and this is good. So alſo if *A.* appoint *B.* his ſon to be his executor when he ſhall come to his full age; and in the mean time he dieth inteſtate. Again, one may make and appoint the executors of *A.* to be his executors, and then if he die before *A.* he is inteſtate, until *A.* die. This creation may alſo be conditional, and the condition may either be precedent or ſubſequent.

In the time of *H.* 6. one named *A.* and *B.* his executors, and if they would not take it upon them, then *C.* and *D.* ſhould be his executors: and then there *A.* and *B.* refuſed; and the queſtion was, whether in ſuit againſt the debtors of the teſtator, *A.* and *B.* ſhould join with *C.* and *D.* as where four executors being named, and two refuſe, and the other two prove the will, yet all four muſt be named in ſuits againſt the teſtator's debtors, as was there admitted. But in the principal caſe it was reſolved, that the ſuit ſhould be only in the name of *C.* and *D.* for that the appointing of them to be executors, if *A.* and *B.* refuſed, did imply, that then they only ſhould be executors. And here all four were never made, nor intended to be executors, but *A.* and *B.* upon a condition ſubſequent that they ſhould not refuſe: and *C.* and *D.* upon a condition precedent, *viz.* if *A.* and *B.* did refuſe.

It is uſual to make one or more executors, conditionally, that they put in ſecurity to pay legacies, or in general to perform the will; nor was it ever doubted, as I think, but that this was good: yet I ſhould adviſe, that ſuch condition be plainly thus expreſſed, *viz.*: that if *I. S.* do put in ſecurity, *&c.* by ſuch a day, that then he ſhall be executor, elſe not: or thus, *viz.* to make him executor conditionally; that before he does adminiſter (funeral perhaps excepted) he ſhall put in ſuch ſecurity; elſe perhaps, he being executor till the con-

condition broken, in that mean time may have diſpoſed of all or moſt part of the teſtator's eſtate.

In the reign of Queen *Eliz.* there was a caſe remarkable to this purpoſe: One willed that if his wife ſuffered *I. S.* to enjoy *B.* (being part of her jointure) for three years, then ſhe ſhould be his executor, or elſe *A. B.* ſhould, and the queſtion was in the *Common Pleas*, whether preſently, before the end of the three years, ſhe were executor, or not till ſhe ſuffered the land to be enjoyed three years; and it was held by all the judges, but the Lord *Anderſon*, that ſhe was preſently executrix, until ſhe ſhould diſturb *I. S. &c.* for, upon that done, it agreed, that the executorſhip would, by virtue of the condition, be transferred from the wife to *A. B.* But now during theſe three years might ſhe have diſpoſed of all the goods of her huſband, yea, within one of theſe three years, and leſs time, and then have broken the condition, and have left to *A. B.* a dry executorſhip.

As to the third point, one may divide his executor's power three ways, *viz.* really, locally, or temporally. Really thus: He may make *A.* his executor for his plate and houſhold ſtuff. *B.* for his ſheep and cattle. *C.* for his leaſes and ſtates by extent. *D.* for his debts due to him, and ſo divide the power and adminiſtration of his executors at his pleaſure.

He may divide them alſo, or their power, locally, *viz. A.* for his goods in *com. Buck. B.* for thoſe in *com. Oxon.* And *C.* for thoſe in *com. Berk.* He may alſo divide them in time; *viz.* his wife or any other perſon to be executor during her life, or during the minority of his ſon, or ſo long as ſhe continues widow, and after his ſon to be executor; ſo of like limitations or diviſions, either for time, place, or things wherewith they ſhall intermeddle.

Doubtleſs one may be made executor for one particular thing only, as touching ſuch a ſtatute or bond, and no more; and thereof good uſe may be made, thus: many have bonds, ſtatutes, and recognizances, for warranty or enjoying of land, or freeing, or ſaving harmleſs from incumbrances in general or particular. Now he which hath theſe, ſelling the land, may by letter of attorney lawfully aſſign them to the party who buys the land or leaſe; but this notwithſtanding the intereſt remains in him who ſells, and by his outlawry, they may be forfeited or by him releaſed, any bond to the contrary notwithſtanding; and if he die, the intereſt in law will be in and go to his executors, and in their names; only ſuit or execution may be had and maintained.

If the vendor, beſides aſſignment, makes as to this ſtatute, recognizance or obligation, only the vendee executor; by this, the intereſt, after death of the party, will be in him actually and really to his greater

greater ſafety, ſince none but he can releaſe or diſcharge, nor any other name need to be uſed to ſue, or take benefit thereof.

Queſt. If the vendee, his heirs and aſſigns, may be made executors, ſo as that ſecurity ſhall go to them one after another without renewed making of executors?

Thus, if the party make no other executor, he dies inteſtate as to the reſt of his eſtate, and as to this ſpecialty only ſhall have an executor, and muſt have a will proved: and in caſe he does make another will for his eſtate reſidue, there muſt be two wills proved. But in the other caſe, where, by one only will, one is executor for one part of the eſtate, and another for another; there being but one will to be proved, one proving of it is ſufficient. And though in the premiſes of a will two be made executors jointly and equally, yet there may be a *proviſo*, that one ſhall not meddle during the other's life, ſo as they ſhall be executors ſucceſſively, and not jointly; and thus alſo, to other purpoſes aforeſaid, a ſubſequent cauſe or *proviſo* may make the partition and diviſion of authority.

If the *proviſo* or clauſe ſubſequent be merely contrary to the premiſes, it will be void; as where two were made executors, with a *proviſo* or clauſe, that one of them ſhould not adminiſter his goods. This was held void for repugnancy by *Brudnell* and *Engleſield*, Juſtices.

Fitzherbert Juſtice was of opinion that it was not void, nor utterly repugnant. For the other might join in ſuits, though not adminiſter.

Juſtice *Shelly* was of a third opinion different from all the reſt, *viz.* that here was a repugnancy; but the laſt clauſe ſhould controul the premiſes, and ſo this one only ſhould be executor.

Who may make an Executor.

Some perſons may be unable to make wills, and conſequently executors; for that is all one. Whoſoever may make a will may make an executor, and he that may make an executor may make a will.

There are nineteen ſeveral kinds of perſons unable, as the *canoniſts* ſay, to make wills, but with many we will not intermeddle, becauſe we find no mention of them in our law. The perſons principally, and moſt neceſſarily to be conſidered of by us, are either the defective in underſtanding, as infants, idiots, lunaticks, and the like; or defective in power or intereſt, as women covert or married; perſons outlawed, attainted, convict or excommunicate. And likewiſe ſome others, as aliens, corporations, villains, monks and friars.

As

As to an idiot, naturally he is not able to make a will, as was reſolved in the ſpiritual court, becauſe he wants the uſe of reaſon to conceive what is fit for him to will, nor does the common law oppoſe this.

A lunatick having *lucida intervalla*, that is, ſome ſeaſons of enjoying his right mind and freedom from his lunacy, may in thoſe times of his right mind make a will, and executors, elſe not, for even one by age or ſickneſs become of *non ſanæ memoriæ*, is unable to diſpoſe of his lands or goods.

One born deaf and dumb may make a grant, if he have underſtanding, conſequently much more a will: but in the reign of *H.* 8. it is left a demurrer, whether a deed by ſuch, be good or not.

If but mute, he may wage his law, and attorn by ſigns, and ſo perhaps by ſigns declare his will. 44 *Aſſ. p.* 36.

An alien may make or be an executor, ſo as he be not an alien enemy, for ſuch cannot ſue, as in the time of *Eliz.* was held; but there the doubt was, whether a ſubject of *Spain* were at that time to be held an enemy, no war being proclaimed between the kingdoms, though hoſtility exerciſed.

As for perſons attainted, convicted or outlawed, it will be ſaid, that theſe can have no goods of their own, and conſequently, they can make no wills nor executors; and it is not to be denied, that we find it pleaded ſometimes by executors, that their teſtators ſtood outlawed.

It is clear, that all and every of theſe may have goods as executors to others, which neither are forfeited by attainder or outlawry, nor diveſted by marriage or villainage. Therefore as to them they may make teſtaments. And that all theſe ſorts of perſons may be executors is alſo evident. So alſo villains, monks and friars, who can have no goods to their own uſes. And that one attainted of felony may have an executor, appears by a caſe in the time of *Eliz.* wherein it was long debated, whether ſuch an executor might maintain a writ of error, or not, to reverſe the attainder of the teſtator: and as for other outlawries, the plea thereof by the executors, that their teſtator was and died outlawed, proves not a nullity of the will, or executorſhip: for then they might have pleaded, that they were never executors; but it tends to this, that no goods did or could come to them for ſatisfaction of the debts by reaſon of outlawry; yet it has been held, that debts upon contract, where the defendant may wage his law, are not forfeited by outlawry, nor uncertain damages for treſpaſs in battery or falſe impriſonment.

Goods taken away by a treſpaſſer, may yet be forfeited by the attainder or outlawry of him from whom they were taken, for that the property in right ſtill appertained to him, and he might have taken them again whereſoever he found them, therefore the action for this ſhall not come to his executor, but for the other, not forfeited, it may.

Whether an excommunicated perſon be able to make a will or not, may be ſome doubt.

Who may be Executors.

An excommunicate perſon cannot ſue, that is, proceed in ſuit as executor till he be abſolved, there being danger of excommunication to all that converſe with him; but this makes not a nullity of his executorſhip, nor overthrows the ſuit, but ſtays it only from proceeding until abſolution.

As for perſons attainted or outlawed; we have before ſpoken affirmatively in way of proof, that they may make executors for continuation of the executorſhip: So of aliens and others before.

Recuſants convicted at the time of the death of any teſtator are diſabled to be his executors.

Whether corporations compound, or conſiſting of divers perſons, may be made executors or not, I doubt.

Firſt, becauſe they cannot be feoffees in truſt to others uſe: ſecondly, they are a body framed for a ſpecial purpoſe: thirdly, they cannot come to prove a will, or at leaſt to take an oath as others do.

What a Man may give or diſpoſe by his Will.

Having conſidered of the makers of executors by will, and of them ſo made, let us now conſider what by this will may be diſpoſed, given or bequeathed.

Firſt, he who himſelf is an executor, cannot by his will give or bequeath to any other the goods, chattels or credits, he hath as executor, the property not being altered, for that he hath not them properly as his own or to his own uſe: only he may make a continuation of the executorſhip, and his executor ſhall have them as executor to the firſt teſtator, as was reſolved by the judges of both benches in the reign of *Eliz.*

If

If he be adminiſtrator, the bequeſt is then alſo void, nor then will they go to his executor, but to a new adminiſtrator; but on his death-bed he may give them by word or deed, though not by will.

Next if a man have debts owing to him, as many have much, it is conſiderable, whether by way of bequeſt in his will, he can give away theſe to any from his executors.

And doubtleſs he cannot effectually in law, they being not ſubject to aſſignment unto any except the King.

So if he give ſuch a debt to *A.* and ſuch to *B.* yet muſt the ſuit for them be in the name of the executor, and ſo alſo the releaſe or acquittance for them, and not in their names to whom the bequeſt is.

But when they are received, if there be no debts to pay, the executor ought to deliver them to the party to whom the bequeſt is, and therefore may be compelled in court of conſcience, or in the ſpiritual court.

Therefore the caſe of the bequeathing money, payable upon a mortgage, is in this manner to be underſtood to be good, and not otherwiſe, as I take it he that is jointly with any other eſtated in lands or goods can give no part by his will, but all will ſurvive, but by act in his life he may diſpoſe of his part, and the aſſignee may diſpoſe of his moiety by will; yea though it be half an horſe or ox, that cannot be divided.

So of a leaſe of lands, or tithes, or grant of goods to two, *habendum*, one moiety to the one, and the other moiety to the other; each may give his moiety by will.

But if one be poſſeſſed, or eſtated for years by leaſe, wardſhip, or extent, *&c.* in the right of his wife, or have the next avoidance of a church in her right, he cannot by will give or bequeath any of theſe; but notwithſtanding they will remain unto his wife upon his death; but yet his gift or grant of them taking effect in his life-time, would bind his wife, and carry away the intereſt from her.

If one be tenant for the lives of one or more; others, as many times men take leaſes for lives of younger perſons than themſelves, this cannot be by will diſpoſed of, for that it is no chattel, nor is it within the ſtatutes of will, for that it is no ſtate of inheritance. Therefore let the party look to convey it in his life-time, leſt it go to an occupant, *viz.* him who firſt ſhall enter.

If it be an eſtate in land, he muſt either make livery, have a bargain and ſale inrolled, or covenanted to ſtand ſeiſed to the uſe of his

wife, or ſome of his blood, or make a leaſe for years, determinable upon thoſe lives; it is well if it be by bargain and ſale for years if the thing be in leaſe, that ſo without inrolment, or attornment, the rent may paſs, elſe a bargain and ſale may be made for a month, or ſuch like time; and then a releaſe or grant of the reverſion inſtead of livery and ſeiſin.

If a man have a leaſe for never ſo many years, determinable upon life or lives, *viz.* if ſuch or ſuch live ſo long, this ſtate may well enough be given and diſpoſed by will, becauſe it is but a chattel.

If a man ſeiſed in fee, or in tail of land having corn growing upon it, and by his will do give the corn, and die before ſeverance; this is a good bequeſt, becauſe the corn ſhould have gone to the executor.

So it is alſo of a parſon touching his glebe, and a man ſeiſed in the right of his wife or his own right, but for life. But as for trees growing upon the ground, theſe can no otherwiſe be given by will, than as the land itſelf upon which they grow may be given.

Of the Revocation and Countermand of Wills and new Publication.

Having conſidered of the making of wills and executors, let us, before we come to the *probate*, conſider of revocation, for that may take away the force of a will rightly made.

A will therefore having two parts, *viz. inception*, which is the making, and *conſummation*, which is the death of the teſtator or maker of the will, there is power in him, at any time before death, to revoke or alter his will at his pleaſure. Conſider we therefore of revocations, and alſo of new publications or reaffirmance of wills in whole or in part.

As a will may be made by word, ſo alſo may a will made in writing be by word revoked or diſanulled; for ſince every making of a latter will is a countermand and ſuppreſſion of the former will, and ſince a will may be made *nuncupatively* or by word, and ſo, by making a verbal will, one may revoke a written will; it will thereupon follow, that one by word may expreſs the alteration of his mind thus far, that the will by him formerly made ſhall not ſtand but be revoked and annulled; and this will ſtand and be effectual, ſo as if he after die without making any new will, or new publication, or reaffirmance of the former, he dieth inteſtate or without will.

As

As a will may be wholly revoked, ſo alſo in part: as where *R.* by his will in writing did give ſome gavel-kind land to *H.* and five days before his death ſaid, in the preſence of witneſſes, that this gift ſhould not ſtand, and that he would alter it when he came home, deſiring them to bear witneſs of his revocation. Before he came home he was killed by the ſaid *H.* who cauſed the will in writing to be proved, and after he was attainted and hanged for the murder, and his ſon by the cuſtom of *K.* (*viz.* the father to the bough and the ſon to the plough) entered into the land: and this manner of revocation by word only was held ſufficient, although the will in writing were not cancelled nor defaced.

The like reſolution for verbal revocations was implied in the caſe of *F.* and *H.* where it being reſolved that a feme covert or married woman, by word countermanding and revoking her will formerly made, when ſhe was a ſole or unmarried woman: this was not effectual nor of force, by reaſon of her coverture taking away the freedom of her will, hereby it is implied that another, who hath freedom of will, may by word ſufficiently revoke a will in writing.

In a caſe between Sir *E. M* and *J.* concerning the will of Sir *I. J.* a difference was conceived betwixt ſaying, I will revoke my will, which only expreſſed a purpoſe or intent, and therefore was no preſent revocation; and ſaying, I do revoke it, or it ſhall not ſtand, or my heir ſhall have my land, which croſſed the gift of it by the will.

As wills may be wholly or in part revoked, ſo may alſo the executorſhip of one or more of the executors, and yet the will may ſtand in all the other parts, ſo as there be any one executor or more unrevoked; but if all be revoked, then the whole will is revoked, becauſe no will can ſtand without executors: and this revocation may be by word only, without being expreſſed in the will or any other writing. But I would adviſe all to expreſs ſuch revocation in the foot of the will, or that the name or names of the executor or executors ſo revoked be expunged or blotted out of the will, and that this be done in the preſence of ſome witneſſes, to teſtify the act and intent of the teſtator.

Revocations may be by act in law as well as in fact, or by direct and expreſs terms, as in the ſaid caſe of *M.* and *J.* where land being deviſed by will, and the deviſor after making a feoffment, though there were ſome defect in the livery, to make it effectual, or if he made a bargain and ſale, that was never inrolled, or granted the reverſion, but no attornment had, ſo as the land paſſed not, yet in all theſe caſes the will or gift of land ſtood revoked; but in caſe he had only covenanted that he would have made ſuch an eſtate, and not done it, this was held to be no revocation.

It is held by ſome, in caſe he does but make a leaſe, leaving the fee-ſimple as it was, but of this *quære*.

If a difference may not be betwixt making a leaſe for years and a leaſe for life, which altereth the freehold.

If a leaſe for twenty years be bequeathed to *I. S.* and after the teſtator maketh a leaſe for fifteen years, reſerving a rent, I take this to be no revocation of the bequeſt; but if the teſtator, after this will made, take a new leaſe for a longer term, ſo as the former leaſe is ſurrendered in fact or in law, this muſt needs be a revocation of the bequeſt, or at leaſt an annullation thereof, and that although the bequeſt were generally of his leaſe, not mentioning the number of years, for this which he now has is another leaſe, and not that which he had at the time of the making of the will.

So if one give his black gelding by will, and after, before his death, he ſelleth or giveth away that horſe, and buys another black one, this new gotten horſe ſhall not paſs by the will, becauſe it was not the teſtator's at the time of making his will.

So alſo, if the crop in the barn be bequeathed in *October*, and the party lives till that time twelve-month, having ſold that crop and inned a-new, this latter crop ſhall not paſs by the will, and the former cannot.

As revocation may be by alteration of the ſtate of the deviſor, in the land deviſed; ſo may it alſo be by alteration in ſome caſe of the ſtate or quality of the perſon of the deviſor:

As if a woman ſole make a will, and after take a huſband, this without any more, as is reſolved in the ſame caſe of *Forſe* and *Hembling*, doth work a revocation or annullation of the will, for that elſe it ſhould be irrevocable, ſince ſhe, having loſt the freedom of her will, cannot actually and directly make a revocation, as we before have ſhewed. But notwithſtanding her will be revoked, yet in caſe her huſband, before or after marriage with her, were bound or covenanted to perform this woman's will, if he do not ſo, by payment of the legacies therein bequeathed, his bond or covenant ſtands good, and is ſuable againſt him, as was adjudged touching the will of *E. S.* married after her will made to one *W.* who firſt was bound to perform it: yet another caſe there is of alteration in the ſtate of the teſtator's perſon, which makes no revocation of his will.

As if he being of ſound mind and ability make a will, and after becometh frantick. In this caſe this is no revocation, ſo as his will ſtands till his death irrevocable, if he recover not.

Of new Publications.

Having ſhewed how a will may be revoked, and ſo loſe its force, let us now ſee how, without making a new will, that ſo revoked may be revived and ſet on foot again, and that is divers ways:

Firſt, by a *codicil* annexed after thereunto, as was reſolved between *B.* and *B.* in the *King's Bench.*

Secondly, by adding any thing to the will, or making a new executor, *&c.*

Thirdly, by expreſs ſpeech or word, that it ſhould ſtand or be his will.

If a man having made a former will, do make a latter, which is more than a bare revocation; yet if afterward lying upon his death-bed and ſpeechleſs, both theſe wills be delivered into his hand, and he required to deliver to one of his friends about him that will which he would have to ſtand, and to keep in his hands the other, he thereupon delivers to the miniſter, or other his neighbours, the firſt made will, retaining in his hands the latter, as was done in the reign of *E.* 3. here the former will, though made void many years before by the latter, is revived, and ſhall ſtand as the party's will.

We will put the caſe that a bequeſt at the firſt is void, yet by publication after it may be made good, as if one give to *S.* his wife, a piece of plate or other thing, and has no ſuch wife at the time, but after marries one of that name, and then publiſhes his will again; now this ſhall be a good bequeſt.

So if one deviſe lands or goods which one hath not; if he after do purchaſe the ſame, and then ſay that his will before made ſhall ſtand, or be his will, it ſhall be a good will and bequeſt, for this is in effect a new making.

And though moſt of the precedent caſes be of revocation of particular parts of the will, and not of the total: yet firſt, be it conſidered, that that part ſo revoked was in effect the ſubſtance of the will. Next it is eaſily diſcerned that if one part be revocable ſo is another likewiſe; and thus revocation may ſpread itſelf over the whole; nay, doubtleſs the whole, *uno flatu*, may be revoked as well as by parts. And as the *velleities* or diſpoſing parts of the will are revocable and reviveable by new publication as aforeſaid, ſo is alſo the conſtitution of

of executors. As if one of the executors names be ſtricken out, and afterwards a *ſtet* be written over his head by the teſtator, or by his appointment, now is he a revived executor. So if the teſtator expreſs by word, in the preſence of witneſſes, that the party put out ſhall yet be executor; but now I mean, where the executor's name is not ſo blotted out, but that it may be read and perceived; for elſe the *ſtet* is upon nothing, and if the verbal reaffirmance ſhould renew his executorſhip, then muſt the will be partly in writing and partly *nuncupative*, his name not being to be found in the written will.

Of the State of Things inſtantly upon the Teſtator's Death, before any Will proved.

What is wrought by a gift of a thing certain and known, as the white horſe, the red cow, *&c.*

What by a bequeſt to an executor.

What wrought by a releaſe in the will to a debtor.

What by making a debtor or creditor an executor.

As concerning the firſt, *viz.* the bequeſt of a chattel real or perſonal, which the teſtator had in poſſeſſion, notwithſtanding that, if the ſaid teſtator had by his deed or writing, or but by word in his death-bed, or before, given theſe his goods, and died before they had been taken, he to whom they ſo were given, might have taken them, yet in this caſe of gift by will, neither can the legatee take them, or recover them from the executor, or a ſtranger taking them, by any ſuit at law, for that he hath no property in them; if the bequeſt be to himſelf, who is made executor, be it of leaſe, plate, cattel, *&c.* They ſhall not veſt nor ſettle in him as legatee, but as executor, until expreſs or implied election, but made to have and take the ſame by way of legacy.

And the reaſon in both caſes is this, That the law prefers debts and the ſatisfaction of them before legacies, and ties executors alſo to that rule, and therefore will transfer nothing from or out of the executor, till he, having conſidered of the ſtate of the debts to be paid, and goods out of which the ſame are to be paid, ſhall find that ſafely this or that legacy may take effect, without making any defect in payment of debts, or drawing upon him and his own goods any damage or loſs as a waſter: and thereupon ſhall aſſent to ſuch legacy.

Thus now is the law taken; but heretofore ſome opinion has run otherwiſe, That he to whom any bequeſt was made of a thing known and certain, might take it without any aſſent of the executor: and

that

that when to the executor himſelf any goods or chattels moveable or immoveable were bequeathed: in caſe there were otherwiſe ſufficient goods for ſatisfaction of debts, the ſame ſhould inſtantly upon the teſtator's death, without any act or election, by the executor be transferred into and unto him in his own right as a legacy, and not remain in him as executor.

As for ſums of money bequeathed, or ſo much in plate or rings, it is evident that they muſt be had by the delivery of the executor: yet has the legatee ſuch an intereſt before the delivery, as that dying before payment it will go to the executors. But, as I take it, no ſuch to whom any thing certain is given by will, can make any gift or grant of it before the executors have aſſented to his having thereof; nor perhaps will the executors aſſent, after the grant, have ſuch relation as to make good the grant precedent; why ſo yet? more than an attornment of a leſſee, which is a like aſſent to the grant of another?

Quære, If by the outlawry of the legatee, before the executor's aſſent, this thing bequeathed be forfeited?

If without juſt cauſe an executor will refuſe to aſſent, he is compellable by law ſpiritual, or court of conſcience; yet if the ſpiritual court preſſes to do where there is juſt cauſe to ſtay, a *prohibition* lies; for ſince executors ſtand liable to recovery of debts againſt them by common law, it is but reaſonable that the law ſhould enable them to keep wherewith to pay.

Here is ſome ſeeming oppoſition in law; for where before great difference was ſhewn between a deviſe or bequeſt, and a gift of alienation executed in ones life-time; Lord *Dyer* reports it to be reſolved, that where a leaſe for years was made upon condition that the leſſee ſhould not alien in his life-time, that yet a bequeſt of his leaſe by his will, was a breach of the condition, as being an alienation in his life-time.

As to a diſcharge by will to a debtor ſome queſtion may be, whether to perfect and make good this, ſo as the debtor may plead it in bar, there be not requiſite, as in the former, an aſſent of the executor.

On the one ſide, ſince this giving is a forgiving, for he to whom it is bequeathed cannot otherwiſe have it than by way of retainer, it may probably be ſaid, that here needs no ſuch aſſent of the executors, as in the caſe where any thing is to be transferred; for here is rather an extinguiſhment, and an exoneration, than a paſſage of a chattel by way of donation.

On the other ſide, it is probable that it being but a bequeſt, and ſo a legacy, ſince debts are in law and conſcience to be ſatisfied before any legacies, and that therefore the executor having not ſufficient otherwiſe to ſatisfy his teſtator's debts, may ſue for this debt, and refuſe to ſuffer it to paſs away as a legacy. And to this opinion do I incline, as beſt for creditors.

But ſome will perhaps make a contrary doubt, that although there be an aſſent of the executors to this diſcharge, yet it will not amount to a legal releaſe, for that a debt at leaſt, if it be by ſpecialty, cannot be releaſed but by deed, and a will is no deed, for a ſeal is not neceſſary thereunto, though it be fit and convenient; whereto I give this anſwer, that a will, though it be not properly and legally a deed, for it may be good enough without a ſeal, which is an eſſential part of a deed, yet has it the force and effect of a deed; for as a releaſe cannot be made but by deed, ſo neither can an eſtate or intereſt though but for years in tithes, advowſons, commons, fairs, and like things be granted or aſſigned otherwiſe than by deed, yet it is clear, that ſuch an eſtate for years in any of theſe may be given by will, as well as a leaſeof land, which proves a will to have the force and effect of a deed.

Of making a Debtor or Creditor Executor; and firſt of the Debtor made Executor.

Suppoſe we then that *A.* and *B.* being made executors, the teſtator was indebted to *A.* 20 *l.* and *B.* was indebted to the teſtator 20 *l.* how do things ſtand preſently upon death?

Firſt, it is clear that the debt of *B.* to the teſtator ſtands in law extinct, this making of him executor being a releaſe in law. Therefore let debtees take heed of making their debtors executors: And yet doubtleſs I think ſuch a debtor made executor ſhould hold himſelf reſtrained in conſcience from taking benefit thereof, if (the debt remitted) there ſhall want to ſatisfy either debt or legacy of the teſtator: and I doubt whether a court of conſcience may not juſtly ſo order; the teſtator being perhaps ignorant of this point in law, that this debt ſhould be releaſed by making the debtor executor.

And what is ſpoken of making the debtor executor, generally the ſame is to be underſtood of making any one of the debtors executor, where there be many joint debtors, and ſo alſo where many executors be made, and but one of them is debtor to the teſtator, for they cannot ſue without making him who is the debtor alſo a plaintiff, which he cannot do againſt himſelf.

The like law touching actions of treſpaſs or account: yet of old where one made his bailee one of his executors, together with *A.* and *B.* who brought an action of account againſt the bailee, in their two names only; Juſtice *Herle* held the action well brought, *Ed.* 3. but the contrary hath been ſince reſolved: ſome alſo have held, that although in the life of this executor, who was a debtor, he could not be ſued, yet after his death, the ſurviving executors might ſue his executor: but that cannot be, as I take it, for that the debt was utterly extinct, by the making of him executor; as if the teſtator had releaſed it to him, although this executor died before he did ever adminiſter or prove the will. And like extinguiſhment of the debt, if the creditor marry with one of the executors of the debtor, yet was there an action of debt maintained, *temp. Ed.* 3. by the huſband and wife againſt the huſband and other executors, upon an obligation by the teſtator to the wife before her marriage.

But if a debtor take adminiſtration of the goods of his creditor, this I think ſhould not diſcharge him, but that his debt ſhould ſtand as aſſets in his hand, becauſe the inteſtate did no act to free him from the debt.

The Debtor or Creditor made Executor.

This making of the debtee executor, and ſo the party who both ſhould pay and be paid, the debt gives him clearly power to pay himſelf before any other, if his debt be by ſpecialty or upon record.

Some have held that ſo much of the goods of the teſtator ſhall be altered in property out of the executor, as executor, into him as creditor, but how that can be I cannot ſee: for whether ſhall it be ſatisfied out of the leaſe and chattels real or perſonal, whether out of the corn in the barns, cattel in the fields, plate or houſehold ſtuff: this till ſome election made by this debtee executor cannot be known, nor ſhall be effected by any operation of law, preventing the executor's election, in taking his ſatisfaction, where and how he will.

For certainly as an executor has election to pay which creditor he will firſt, ſo has he election to pay and ſatisfy himſelf, by what part of the teſtator's goods he will, yet perhaps if there be ready money in the executor's hands, there ſhall be an alteration of the property of ſo much thereof as was owing by the teſtator to the executor; and if there come not to the hands of ſuch executor ſufficient to pay himſelf, he may have an action of debt againſt the other executor or the heir, as by ſome has been conceived: yet let it be well adviſed of, whether if he do adminiſter at all, and eſpecially if he pay himſelf any part, he has not thereby barred or diſabled his ſuit for the reſidue.

But if he refuſe to adminiſter at all, it were very unreaſonable that he ſhould not be able to ſue the other executors, for ſo a debtor might by ſubtilty make his creditor an executor with others, and take a courſe that his goods ſhould come only into the hands of thoſe others, ſo as the debtor could not pay himſelf; and conſequently, if he could not ſue the other executors, he ſhould thus be ſtripped of his debt by a ſleight.

Quære, If he may bring the action in the name of the other executors, only the will being proved in his name, as well as in the names of the reſt, or whether the action ſhall be brought in his name alſo, and then he be ſevered at his own prayer. But againſt the heir there is none to join with him, and him he may ſue if he has not adminiſtered as executor; this admitted, that the bond extend to the heir, which without expreſs words it does not, though for the executor it be otherwiſe.

Thus having conſidered of the ſtate of things before and without any will proved, or other act done by executors: we ſhould now come to the point of proof, but two things pertinent to it are in order precedent.

What may be done by or to an Executor before proving of the Will.

Of Refuſal, and the Things incident thereunto.

Before Probate, what may be done by or to Executors.

It is clear, that, before proving of a will by the executor, he may ſeiſe and take into his hands any of the goods of the teſtator, and enter into the houſe of the heir, if not locked, ſo to do, and take the ſpecialties of debts, and generally he may do all things which to the office of an executor appertains (except only bringing of actions and proſecution of ſuits.) He may pay debts, receive debts, make acquittances and releaſes of debts due to the teſtator, and take leaſes or acquittances of debts owing by the teſtator. And if before ſuch proving the day occur for payment, upon bond made by or to the teſtator, payment muſt be made to or be the executor, though no will be proved, upon like pain of forfeiture, as if the will were proved.

Alſo an executor may, before probate, ſell or give away any of the goods or chattels of the teſtator.

And whereas the aſſent of an executor is neceſſary to the ſettling and execution of a legacy, as before has been ſhewn; ſo as if one give me his white horſe or black cow by will, or any other well known

thing, I cannot after his death take it, though I come where it is, but am puniſhable by action of treſpaſs, at the executor's ſuit, if he do not aſſent; yet an executor, before the will proved, may give this aſſent, and it will ſtand good; and if he die after any of theſe acts done, the will being never proved by him, yet do theſe acts, ſo done, ſtand firm and good, as I take it.

Yet an executor making his will, and dying before he had proved the will of his teſtator, his executor may not prove both the wills, and ſo become executor to both the teſtators.

In caſe the goods were after debts paid bequeathed to the executor, his executor may take adminiſtration of the firſt teſtator's goods, with the will annexed.

An executor, for goods of the teſtator taken from him, or a treſpaſs done upon the leaſe, land, or a diſtraining or impounding of goods or cattle, may maintain, before the will be proved, actions of treſpaſs, *replevin* or *detinue*, for theſe actions ariſe upon the executor's own poſſeſſion.

Before the proving of a will, an executor cannot maintain a ſuit or action of debt, or the like: and the reaſon is, for that therein he muſt ſhew forth the will proved under the ſeal of the ordinary. And ſo it muſt be if he bring any action for treſpaſs done or goods taken in the teſtator's life-time, ſo as the teſtator himſelf was entitled to the action, and it grows not upon the executor's poſſeſſion.

An executor granting the next avoidance of a church, which to him came from the teſtator; the grantee maintained a *quare impedit*, without ſhewing forth the will: but the executor himſelf might ſo have done, as of his own poſſeſſion, before the will proved, and ſo without ſhewing it under the ſeal of the Spiritual Court as well as actions of treſpaſs or *replevin*, for goods taken after the death of teſtator: yet in the caſe of *G.* v. *F.* which was an action of *detinue* by the executor, for goods taken or detained after the teſtator's death, and the plaintiff did ſhew forth the will proved. But that proves not any neceſſity thereof, or that if the will had not been proved, it could be no hurt to ſhew it forth, ſo upon his own contract for the teſtator's goods, as if the executor ſell cattle, or other goods of the teſtator's before the will proved, he may, for the money payable, maintain an action of debt before he has proved any will: and in this and the action of treſpaſs, there is no neceſſity of naming him executor.

On the other ſide, an executor may well enough be ſued for debts of the teſtator, before the will be proved; for he may not, by his own act of delaying the *probate* of the will, keep off ſuits, except he will refuſe

refuſe in due manner, that ſo, adminiſtration being granted, there may be ſome body ſuable by the teſtator's creditors for debts by him owing.

The uſual plea of the defendant, to eſtrange himſelf from the teſtament, is to ſay that he neither is executor nor has adminiſtered as executor. So as if he either be executor *de jure* or *de facto* by his own act of adminiſtring, it is ſufficient.

Of Refuſal to prove the Will, and therein of Adminiſtration, foreſtalling Refuſal.

Concerning this other point, proper to be treated of before we meddle with the *probate*, *viz.* refuſal to prove, we will conſider theſe ſeveral parts, *viz.*

Firſt, how and in what manner refuſal may or muſt be.

Secondly, in what caſes, or in reſpect of what acts, one named executor has loſt or determined his election of refuſal or acceptance.

Thirdly, of what effect and operation the refuſal is, what difference where all the executors refuſe, and where but ſome or one of them.

Fourthly, what relation it has.

As to the firſt, the ordinary, before committing adminiſtration where a will is made and executors named, if he know of it, muſt ſend out proceſs againſt the executors to come in and prove it, and if they do not come, they are to be excommunicated; but if they do come, if they nor any of them will prove by reaſon of ſuch refuſal, the ordinary may commit adminiſtration; perhaps alſo they may be appointed executors at a time future, and not preſently.

Refuſal cannot be verbally or by word, but it muſt be by ſome act entered or recorded in the Spiritual Court, and therefore muſt be done before ſome judge ſpiritual, and not before neighbours in the country; for that is not effectual.

Yet Sir *Ralph Rawlett* making the Lord Keeper *Bacon*, *Catlin* Chief Juſtice, and the Maſter of the Rolls executors, they wrote a letter to the ordinary, that they could not attend the executorſhip, and therefore wiſhed him to commit adminiſtration, who did ſo, making every of their refuſal, and this was held good. So as a leaſe being by that will bequeathed to *Catlin*, and he after this refuſal entering and aſſigning it to one, and the adminiſtrator aſſigning it to another;

another; it came in queſtion between them, whether had beſt right, and judgment was given for the aſſignee of the adminiſtrator, againſt *Catlin*'s aſſignee, whereas, if the refuſal had been void, *Catlin* had continued executor, and ſo his title had been better. Firſt, in caſe the ordinary himſelf be made executor, there, it is ſaid, he may refuſe before his commiſſary, and ſo was it there pleaded for the archbiſhop of *Canterbury*, who was made executor to Sir *William Oldhalle*.

What ſhall be ſuch a meddling or adminiſtering by an Executor that he cannot refuſe after.

Secondly, where an executor has adminiſtered, he cannot afterwards refuſe, becauſe he has already accepted of the executorſhip, and ſo determined his election: at leaſt the ordinary ought not to accept of ſuch refuſal, but ſhould compel him to take upon him the executorſhip, as the law was taken both in the time of *Ed.* 4. and of Queen *Eliz.* Yet if the ordinary do admit one to refuſe, notwithſtanding that he has adminiſtred, this ſtands good, as it ſeems conceived by the judges in the time of *Hen.* 6. for there the executor commanded one to take goods of the teſtator, out of the hands of *I. S.* who did accordingly, and afterward the executor refuſed before the ordinary, and adminiſtration was committed to the ſaid *I. S.* who brought an action of treſpaſs againſt the party ſo taking the goods from him, and there the refuſal and committing adminiſtration were admitted to be good: ſo perhaps *factum valet quod fieri non debuit.* And it may be that the ordinary did not know of the executor's intermeddling at the time when he did admit of his refuſal.

After refuſal and adminiſtration committed, the executor cannot go back to prove the will, and aſſume the executorſhip: but if only upon the executors making default to come in upon proceſs to prove the will, the adminiſtration be committed, here the executor may yet at any time after come and prove the will, and ſo undo the adminiſtration: as was in the reign of *Eliz.* reſolved, between *B.* and *B.*

But what if after refuſal it ſhall appear to the ordinary, that the executor had adminiſtred before his refuſal, ſo as, had it been then known, the ordinary ſhould not have admitted him to refuſe; Whether now may he revoke his adminiſtration (for it is revocable) and enforce the executor to proceed to proving of the will?

And ſurely I think he may, for that the executor by adminiſtring had determined his election, and accepted the office of executorſhip; now he cannot both accept and refuſe. Beſides, we know that creditors may maintain their ſuits againſt him, having once adminiſtred the common plea to free himſelf, and ſhew that he is not the party ſuable

ſuable for the teſtator's debt, being that he neither is executor nor ever did adminiſter as executor, wherefore he having adminiſtred, it will be found againſt him.

Now it is not congruous, that in the Spiritual Court there ſhould be no executor, and yet in the courts of *Weſtminſter* there ſhould be an executor.

Since this point of adminiſtering is ſo material to the point of being admitted, or not admitted to refuſe; we will conſider in this place what ſhall be ſaid to be an adminiſtration by an executor, determining his election and diſabling his refuſal, and what not.

Some will perhaps conceive, that the act of the executor in the fore-mentioned caſe, where he only commanded *I. S.* to take goods of the teſtator's out of a ſtranger's hands, was no adminiſtration.

Lord *Dyer*, in the caſe of *G.* v. *F.* ſays expreſsly, that the ordinary might there have rejected the executor's refuſal; for, ſays he, when the executor had once intermeddled, he ſhould not have been ſuffered to refuſe; ſo as he does clearly admit that to have been an adminiſtration.

And elſewhere it is held, that if an executor take goods of the teſtator, and convert them to his own uſe, this is an adminiſtration; yea, if he do but take them into his hands, without converting them: if the wife take more apparel of her own than is neceſſary, this is an adminiſtration; but if by the aſſent, or delivery of the executor, it is not more clearly, if one do either pay debts of the teſtator, or receive debts, or make acquittances for them, or demand the teſtator's debts as executor, or give away goods which were the teſtator's, or deliver money of the teſtator's for fees about proving the will: all theſe be full and clear adminiſtrations as executors.

Fitzherb. ſays, if he only lay out his own money for fees, this is no adminiſtration, ſo if he pay debts with his own money, and if he do it about the funerals; but ſome difference may be between acts done by one named executor and by a ſtranger, *viz.* to make him an executor of his own wrong, whereof we ſhall ſpeak after.

If one, being ſued as executor, take it upon him, and plead in bar as an executor, this is an adminiſtration.

Of

Of the Force and Effect of Refuſal.

As to the third point, *viz.* the force or effect of refuſal.

Firſt, it is clear, that if there be but one executor, and he do refuſe, or being many, if they do all refuſe, then is the party dead inteſtate, and adminiſtration is to be committed with the will annexed, as is before ſaid, nor can any after meddle as executors.

In caſe there be divers executors, *viz.* *A.* *B.* and *C.* and *A.* only refuſeth, and the will is proved by the others, there *A.* continues an executor, notwithſtanding his refuſal, ſo as he ſtill may releaſe debts of the teſtator; and debts owing by the teſtator may be releaſed to him; and if ſuit be to be had, by or againſt the executors, it ſhall not be in the name of *B.* and *C.* only; but *A.* alſo muſt be named as a plaintiff or defendant, elſe the action may be overthrown. For the will being proved, all the executors, therein named, ſtand and continue executors, notwithſtanding any of their refuſal.

Therefore this executor, which hath refuſed, may afterwards adminiſter at his pleaſure, and intermeddle with the goods as well as the others: It was ſaid by *Brooke*, Chief Juſtice, after the death of his companion, he cannot ſo do, but then the executor of him who proved, is only to adminiſter, *quod non eſt lex.*

There may be ſome difference between ſuits by executors, and ſuits againſt executors; for when themſelves ſue, they, being privy to the will, and having the cuſtody of it, muſt bring their action in the name of all the executors, according to the will; but he that is to bring an action againſt them, need not perhaps take notice of more executors than thoſe that have proved the will, or otherwiſe do adminiſter: for it is no good plea for themſelves in an action againſt them, to ſay there is another executor, without ſaying alſo that he has adminiſtered.

It is further ſaid, that if ſuit be brought againſt all, yet one of them not intermeddling with the proving of the will, may plead that he was never executor nor adminiſtred as executor.

By this it ſhould ſeem, that the executors refuſing (I mean all of them, ſo as no will is proved) they, in an action againſt them, may ſay, that they were never executors; but I think they ſhould not ſo plead, but ſhew the ſpecial matter.

Of proving Wills.

Let us now take a view of the *probate* of wills, which we will divide into the four following parts:

Where, and before whom, and how, the proof muſt be.

What ſhall be bona notabilia, *to entitle to* probate.

What force and validity either a right or erroneous probate *hath.*

What relation either probate *or* refuſal *hath.*

As to the firſt: The proving is in the Spiritual Court; yet in ſome manors by proſcription, wills are to be proved before the ſteward, though no lands thereby paſs; and in the manor of *Mansfield* is this preſcription, and in others.

It was ſaid by the judges in the time of *H.* 7. that this proving of wills in the Court Spiritual is not ancient but of latter times. And it is acknowledged by *Lingwood*, Dean of the arches, that it pertains not to the Spiritual Court of common right, nor is ſo in uſe in other kingdoms.

The reaſon why the law of *England* has herein given way to the ordinary and Court Spiritual, is ſaid to be the piety and integrity which is preſumed to be in thoſe of that function.

Wills proved in *London* and *Oxford*, before the major, that is only in reſpect of the burgages within thoſe places deviſable, but they were to be proved alſo before the ordinaries, in reſpect of the goods, and there only where no lands bequeathed.

The proving then is to be before the ordinary, general, particular or ſpecial.

By general, I mean the *Metropolitan* or archbiſhop, before whom it is to be proved, in caſe the teſtator have goods valuable, called *bona notabilia* in divers dioceſſes, whereof he is ſuperior.

Of Bona Notabilia.

What ſhall be ſaid to be *bona notabilia* is conſiderable, about which has been great diverſity of opinions: ſome hold that they muſt be of 40*s.* value, ſome 5 *l.* ſome 10 *l.* and others that the value of a penny

penny ſufficeth to draw it to the archbiſhop from the particular biſhop; but that difference of opinion I conceive to be now cleared, by a *canon* made in the firſt year of *Jac.* 1. at a convocation then held, whereby it is eſtabliſhed, that 5 *l.* ſhall be the ſum or value of *bona notabilia*; yet therein is this proviſo, that where by compoſition or cuſtom in any dioceſſes, *bona notabilia* are rated at any greater ſum, the ſame ſhall continue unaltered.

It is likewiſe thereby provided, that if any man die in *itinere*, *viz.* in his journey, the goods which he then has about him, ſhall not prevent adminiſtration being committed, or the will being proved before the Metropolitan.

Of the Validity and Invalidity of Probates.

As to the third point, we will firſt ſee of what validity an erroneous proof is, concerning which we ſhall find this difference: admitting that one has not *bona notabilia* in divers dioceſſes, ſo as of right the proving of the will belongs not to the Metropolitan, and yet the will is proved before him; this is not merely void, but ſtands in force till it be reverſed by ſome ſentence upon appeal.

But on the other ſide, in caſe one have *bona notabilia* in divers dioceſſes, or a peculiar and a dioceſs, and yet the will is proved before a particular biſhop, within whoſe dioceſs part of the goods are; this is utterly void, without any reverſal.

And in caſe one have *bona notabilia*, both in the dioceſs of *Canterbury* and in the dioceſs of *York*, the will muſt be proved before both Metropolitans, if within each of their juriſdictions there be *bona notabilia* in divers dioceſſes; or elſe, if there ſo be not in any of the places then before the particular biſhops in thoſe ſeveral dioceſſes, where the goods are. Or if within the one juriſdiction Metropolitan, the teſtator had goods in divers dioceſſes, and in the other but in one dioceſs: then in the one place is the will to be proved before the archbiſhop, and in the other place before the particular biſhop, and ſo alſo of peculiar juriſdictions.

In ſome places archdeacons have peculiar or juriſdiction ordinary, and power to take *probates* of wills and grant adminiſtrations.

Where any like error or miſproving is in theſe reſpects, it is cauſe of reverſal or nullity, according to the former difference; ſo alſo, if there be error in the proof, were it *communi forma*, that is, without witneſſes, or by examination of witneſſes, yet may it in the Spiritual Court be undone; if either diſproof can be made, or proof of revocation of that will once made, or of the making of a latter.

Admitting the will true and right, and alſo rightly proved; let us yet ſee the force and ſtrength of the proof, or will ſo proved.

It being under the ſeal of the ordinary, cannot be denied, ſays one book, to wit, whether this ſhewed forth, be a will proved or not, no, though the proof be but indorſed on the back, *viz.* that it is ſo proved.

But notwithſtanding the defendant, ſo ſued, may deny that the plaintiff is executor, as not being concluded nor eſtopped by the *probate*. And the reaſon is, becauſe the ſeal of the ordinary is but matter in fact, and not matter of record; nor are the ſentences of divorce, and the like, in the Spiritual Court, judgments or matters of record; as hath been often held.

Of the Relation of Probate and Refuſal.

As for this laſt point, both the proving and refuſal ſhall have relation to the death of the teſtator, as I take it to divers purpoſes. So as to the proving, ſays the Lord *Dyer*, in *G.* and *F.*'s caſe, and the reſolution alſo of the caſe proves it. For there adminiſtration being committed before any will proved or notified to the ordinary, as it ſhould ſeem, the adminiſtrator ſold ſome of the goods to *I. S.* and after the executors proving the will, brought an action of *detinue* for thoſe goods againſt *I. S.* who pleaded this adminiſtration and ſale, and thereupon the executor demurred, and judgment was given for him, as having by the proving of the will, diſproved the adminiſtration *ab initio*: but it is true, that judgment was given only by two judges, one being abſent, and the other diſſenting in opinion; yet I think it was right, and according to law; and that refuſal ſhall have the like relation; elſe could not the adminiſtration relate to the death of the inteſtate, as it doth to ſome purpoſes, expreſſed in ſeveral books, *viz.* to have an action of treſpaſs for goods taken before adminiſtration committed, and to have a rent growing payable in that mean time, *&c.*

What Fees to be paid upon Probate, or for Copies of Wills, or Inventories.

Per ſtat. 21 *Hen.* 8. *cap.* 5.

Where the goods amount to not above 5 *l.* *ſixpence to the ſcribe.*

Where they are above 5 *l.* but under 40 *l.* *two ſhillings and ſix-pence to the* B. B. *and one ſhilling to the ſcribe.*

Where

Where above 40 *l.* to be taken, *two ſhillings and ſix-pence to the* B.B. *and the ſame to the ſcribe; or one penny for each ten lines of ten inches long at the ſcribes choice.*

Theſe ſums are to ſatisfy, both for proving, regiſtring, ſealing, writing, praiſing, making of inventories, giving acquittances, fines, and all other things concerning the ſame.

Where land is given to be ſold, neither the money raiſed, nor the profits thereof, ſhall be accounted as any of the teſtator's goods or chattels, ſays the ſtatute.

Note. The will is to be brought with wax thereunto ready to be ſealed, and proof to be made of the will, according to the common cuſtom.

For making the inventory, the executor is to take or call to him two creditors or legatees of the teſtator, and do it in their preſence, or in their abſence or refuſal, two honeſt perſons being next of kin, or in their default, two other honeſt perſons.

The inventory is to be indented, and one part left with the ordinary, and the other to remain with the executor.

The executor is to make oath for the truth of it.

For a copy deſired by any, either of a will or inventory, no more is to be paid than before is allowed for the regiſtring, with the like election to the ſcribe or regiſter, as above ſaid.

Swinborne ſays, that an executor is to ſwear, and, if it ſhould be thought fit, to be bound to make a true account when he ſhall be thereunto lawfully called by the ordinary.

It is alſo ſaid, that where a debtor is made executor to the debtee, he ſhall yet account before the ordinary for this debt: yea as of money in poſſeſſion, ſays one, which others denied.

An executor by wrong, ſhall be drawn to account before the ordinary, ſays *Moyle*, Juſtice. By *German*, he may not force any to account againſt the order of the common law; not ſhewing what that is. In the reign of *Ed.* 4. it is ſaid, at leaſt by the reporter, that after the will proved, the ordinary has no more to do.

What Things ſhall come unto Executors and be Aſſets in their Hands, and what not.

The things which ſhall come to executors, are of great multiplicity, it will be neceſſary therefore to divide and ſort them out in parts.

Firſt, we will divide them into things poſſeſſory, or actually in the teſtator, and things in action, or not actually in the teſtator.

Secondly, the poſſeſſory into chattels, real and perſonal, or moveable and immoveable.

Of Chattels Real poſſeſſory.

Theſe may be divided into two kinds, *viz.* living and not living; the living are the wardſhip of the body of another, be it by reaſon of a tenure of the preſent owner or by aſſignment from the King, or other Lord of whom the tenure was, is a chattel real, not perſonal, though it be an intereſt in the perſon of another, but it is in reſpect of a tenure of land, or other hereditament, and is for years, *viz.* during the minority, or till marriage had, and ſo is real.

A villain for years as by grant for a term from him that had the inheritance, is a chattel real.

An apprentice for years, it is by cuſtom that he goes, or is derived to executors; but, for reaſon after ſhewn, I think this intereſt is not in the realty, but in the perſonalty rather. So of a debtor in execution for debt, the intereſt in him, or perhaps more properly in his liberty, is not as I conceive (for reaſons which after I ſhall expreſs) a real, but a perſonal chattel. The like law of a priſoner taken in the wars.

As for fiſhes in a pond, conies in a warren, deer in a park, pigeons in a dove-houſe, where the teſtator had the inheritance, or but for life, in the pond, warren, park and dove-houſe, they are not chattels at all, nor to go to the executors, but to the heir with the inheritance. If the teſtator were but a termor, they are to go the executor, but as acceſſary chattels, following the ſtate of their principal, *viz.* the warren, park, dove-houſe, pond, *&c.*

The real chattels, not living, are either in houſes or lands moſt uſually, and that three ways. Firſt, by leaſe for years. Secondly, by wardſhip of lands held by knight's-ſervice. Thirdly, by extent upon

upon judgments, ſtatutes or recognizances; or in things iſſuing out of houſes or lands, as rents, commons, eſtovers, or ſuch like. But where an inheritor reſerves a rent upon a leaſe for years, this ſhall not go to the executor, but to the heir, with the reverſion other than arrearages behind, at the death of the teſtator. Alſo commons, corodies for years, advowſons, tithes, fairs, markets, profits of leets, and ſuch like, which the teſtator had for years, all which may accrue any of theſe ways, as the firſt are chattel and real. Yea, one ſimple preſentation to a church, upon the next avoidance, is a real, and not a perſonal chattel, before it come to be void, and what then it is, we ſhall after ſhew.

The title accrued to the crown, upon attainder of felony, where the party held not of the King, *viz.* the *annum diem & vaſtum*, that is, power not only to take the profits for a year, but to waſte and demoliſh houſes, and to extirpate and eradicate trees, and woods, is but a chattel, and therefore though granted to one and his heirs, by the King, yet ſhall go to the executor, and not to the heir.

Some doubtful or leſs clear Caſes, touching Chattels Real.

Where we ſpeak of wardſhip, it is not to be underſtood of wardſhip, by reaſon of ſoccage tenure, for that goes not to the executor, but he ſhall be next guardian, who now after the death of the firſt guardian, ſhall be next of kin, if the ward continue under fourteen years old, elſe he is out of wardſhip.

If one have a leaſe for three lives to him and his aſſigns, this is no chattel, nor ſhall go to the executor, nor to the heir, but to him who firſt enters, and claims it as an occupant, if no aſſignment be in the life of the leſſee made: it is otherwiſe of a leaſe for many years, if three or more, or leſs, ſo long live; this is a chattel, and ſhall go to the executor. So an extent upon a ſtatute, yet it is delivered to the party as a freehold, *viz. Ut liberum tenementum*, but that only makes it to be *quaſi liberum tenementum*, as to the maintaining an aſſiſe, if wrongfully put out.

Where one is ſeiſed, in the right of his wife, of land or other hereditament, and is attainted of treaſon or felony, the profit thereof accrued unto the crown, is but a chattel, and though the King grant it to one and his heirs, yet it ſhall go to his executors.

If one having a leaſe for many years, *viz.* 100. 500. or more, or leſs, and do deviſe and bequeath the ſame to *A.* and the heirs male of his body, and for want of ſuch iſſue to *B.* and the heirs male of his body, and dieth, having iſſue a ſon, the term ſhall not go to his ſon,

but

but to his executor or adminiſtrator, for it cannot be made a matter of inheritance; ſo if *A.* had died without iſſue male, the term ſhould not have gone or remained to *B.* but to the executor or adminiſtrator of *A.* as it has been adjudged.

So of an advowſon, or any other hereditament, granted or deviſed to one and his heirs for 100 years; or if ſuch a termor grant a rent out of the land to *A.* and his heirs, or the heirs or heirs male of his body, yet ſhall the ſame go to the executor, and not to any heir; for it being derived out of a chattel, cannot be any freehold or inheritance, but itſelf a mere chattel.

Of Chattels Perſonal.

Perſonal chattels, or goods moveable, are alſo in like manner to be divided into quick or dead. The quick are cattle of all kinds, as ſheep, horſes, kine, bullocks, ſwine, goats, geeſe, ducks, poultry, *&c.* There may be alſo in living creatures reaſonably an intereſt, as in a chattel perſonal, as in the perſon of a man taken in execution for debt. And this I hold to be in nature, not a real, but a perſonal chattel (as before was obſerved) for that debt is the root of it, and the body is but a pledge or gage, diſchargeable inſtantly upon payment, releaſe, or other diſcharge of the debt. So likewiſe of a priſoner taken in the wars, for thereof and therein, as in a chattel, has the party a legal intereſt.

In the time of King *Henry* 8. the King himſelf, upon the winning of *Bullen*, bought divers priſoners of his ſubjects. And by a ſtatute in the reign of *H.* 6. this intereſt in a priſoner is mentioned as valuable, and coming from one King to another; therefore doubtleſs ſhall go from teſtator to executor by death, and not to be enfranchiſed or freed thereby.

The intereſt which one has in an apprentice, I take to be rather perſonal than real, though for years, becauſe not ſpringing out of any real root, as wardſhip and villainage do; but out of a mere contract.

A ſervant, whoſe maſter is dead, doubtleſs is legally diſcharged, and is not ſervant to either heir or executor.

Things perſonal without life; theſe are evident, *viz.* all houſehold ſtuff, implements and utenſils, money, plate, jewels, corn, pulſe, hay, wood felled and ſevered from the ground, wares, merchandiſe, carts, plows, coaches, ſaddles, and ſuch like moveable things.

Doubt-

Doubtful Cases touching Things Personal.

Concerning things living: if the testator had any tame pigeons or deer, or conies, or pheasants, or partridges, these all, as well as chickens, shall go to the executors; so, though not tame, if they were taken and kept alive in any room, cage, or like receptacle, as pheasants and partridges often are; so fish in a trunk, as also young pigeons, though not tame, being in the dove-house, not able to fly out; yet their dams, the old ones, shall go the heir with the dove-house.

If the testator had any reclaimed hawks, they also as chattels personal shall go to the executor, because they are things commonly vendible. And though hounds, greyhounds, and spaniels, be not so commonly bought and sold, yet are they now grown to be a merchandize, for although they be for the most part but things of pleasure, that hinders not but that they may be valuable, as well as instruments of musick, both tending to delight and exhilarate the spirits.

It may perhaps be objected that none of these are cattle, and therefore not repleviſable, consequently no property in them; for when more than one living chattel is distrained, the *replevin* is to be by the name of *averia*, signifying cattle. For answer thereunto, One may have property in divers things, whereof no *replevin* lies, as corn or hay, not in sacks or carts, money not in a bag, nor box, *&c.*

As to things without life, and first to those abroad in the fields. Put the case that a man dies in *July* (before harvest I mean) seised for life, or in fee or tail, in his own right or his wife's, or estated for years, of land, in the right of his wife, being sown with corn or any manner of grain, the common saying is, *quicquid plantatur solo, solo cedit*, yet this shall go to the executor of the husband, and not to the wife or heir, who shall have the land: but hay growing, *viz.* grass ready to be cut, apples, pears, and other fruit upon the trees, shall go to the wife, as also if they had been upon a man's own land of inheritance, they should go to the heir, though the corn should go to the executor.

The reason of the difference is, because this latter comes not merely from the soil, without the industry and manurance of man, as the other do: and I take hops though not sown, if planted, and saffron and hemp, because sown, to pertain as corn to the executor. All those yet shall pass to one, to whom the land is sold or conveyed, if not excepted, though never so near reaping, selling or gathering.

What if the wife had the leaſe for years as executor to ſome former huſband or other friend, and the huſband after ſowing dies, who then ſhall have the corn? Certainly the corn ſhall go to the executor of the laſt huſband, at leaſt ſo much as is more than the year's value of the land, or the making it up by addition of other things, for the value is to be aſſets for payment of debts and legacies. Put the caſe again, that the huſband and wife were joint-tenants of the land, and then the very corn growing ſhall ſurvive to her, together with the land, and though the huſband ſowed it, yet ſhall it not go to his executor. Being in conſideration of things growing on the ground, as trees ſold by *I. S.* ſeiſed of the inheritance, of the land to *I. D.* who died before felling; this intereſt is a chattel which ſhall go to the executor, and not to the heir of *I. D.*; but ſome colour may be that theſe, becauſe fixed to the ſoil and freehold, are real chattels, as the intereſt in land is, and not perſonal.

Alſo of trees excepted by him who ſelleth the inheritance of the land, but in both caſes I conceive this intereſt to be perſonal, and not real; for that, as it is a property of chattel in the vendee, or vendor with exception, it ſtands in conſideration ſevered and abſtracted from the ſoil, or ground where the trees grow, though the trees be not actually ſevered by the ax from their mother earth.

If the leſſor for years or life except the trees, theſe continue parcel of the freehold and inheritance. And after corn reaped, and before the tithe ſet out, the inheritor of the tithe dying, I think the executor, and not the heir, ſhall have the tithe after ſet out.

We ſhall now come home to the teſtator's houſe, and examine in and about it. Some have doubted what pertains to the heir and what to the executor; particularly concerning coppers, leads, furnaces, fats for dyers or brewers, pales, rails, glaſs in windows, wainſcots, doors, locks, keys, and ſuch like; to whom theſe ſhould go? Whether to the heir or executor?

In the reign of *H.* 7. an executor taking a furnace which was ſet in the middle of a houſe, and not fixed to any wall, the heir brought an action of treſpaſs againſt him for ſo doing, and it was adjudged for the heir, *viz.* that this was to go as part of the freehold and inheritance to the heir.

In the reign of *Eliz.* Juſtice *Walmſly* ſaid, that the Lord *Dyer*'s opinion was, that where the furnace is not fixed to the wall, the leſſee might within his term take it away. Otherwiſe, if it were fixed to the wall, for then it ſtrengthens the houſe. Notwithſtanding it might be in the one caſe ſo removed by the leſſee, yet it is not there, as he ſaid, a chattel perſonal or moveable, ſo as it is attachable; and there the caſe being that a clothier, being a termor of an houſe, had fixed

fixed a copper to the wall, with looms and pricks neceſſary for his occupation, a judgment being had againſt him, the ſheriff delivered the copper in execution as a chattel, and after the leſſee took it up, and it was taken from him by virtue of the execution; whereupon he brought an action of treſpaſs, and by all the judges the action was maintainable.

It was found by the jury, that by the cuſtom of *Kent* the leſſee might remove ſuch a copper; Juſtice *Beaumont* ſaid, that, without any cuſtom, a leſſee might ſo do at any time during his term.

Note, In the ſaid caſe, that the furnace was by itſelf delivered as a moveable chattel, and not as part of the houſe, for that was not taken notice of, nor delivered in extent.

And as to all other fixed things, the law was taken in the ſaid caſe, *Hen.* 7. to be all one as in the caſe of the furnace, *viz.* that they ſhould go to the heir.

As to poſts fixed, for that they be parcel of the freehold, ſo alſo of milſtones, anvils, doors, keys, windows, none of theſe are chattels, but parcel of the freehold, or thereto pertaining, therefore not the executor's.

Concerning things in gardens: I before laid down a difference betwixt things ſowed, or not ariſing from the earth without manuring, and ſuch as grow of themſelves; it will thence be concluded that the roots, of carrots, parſnips, turnips, and ſuch like, coming and ariſing from yearly ſowing, muſt go the executor, and not to the heir.

Let us now conſider of things, though not fixed to, yet uſually kept in houſes, *viz.* writings, and evidences, whereabout generally no doubt can be, but that they follow the intereſt of the land, ſo as if they touch inheritance they pertain to the heir; if but terms, goods, chattels, or debts, they pertain to the executor, and ſo do ſtatutes, and bonds in law (howſoever otherwiſe in equity) though they concern the aſſurance and enjoying of inheritance purchaſed.

What if *A.* mortgage the inheritance of lands to *B.* upon condition of redemption by payment of 500 *l.* to *B.* his heir, or executor, and *B.* dies, the deeds being delivered into his hands; now the heir, not the executor, ſhall have them; for though the money may be paid to the executor, yet in the mean time the lands deſcend to the heir, nor is there any debt to the executor, for *A.* may chooſe to pay or not.

Put it on the other ſide, that the land had been ſold for 500 *l.* not paid to *A.* but a condition that if not paid to him, his heir or execu-

tor, by ſuch day, then to re-enter; and *A.* dies; here is a debt to the executor, and no land deſcended to the heir of *A.* yet ſhall the heir have the deeds, for that a condition is deſcended to him.

It has been a *quære* touching boxes and cheſts, wherein the evidences concerning inheritance are; and although the better opinions in our books do pitch upon this difference, that where they are ſealed up they ſhall pertain to the heir, otherwiſe where not ſealed; I cannot conceive that difference to be grounded on good reaſon; but rather think that boxes, which have their very creation to be the houſes or habitations of deeds, ſhould, as appurtenant to them, go to the heir, whether ſealed or not.

On the other ſide, cheſts made for other uſes, *viz.* the keeping of apparel, ſhall not, as I conceive, be taken as appurtenant to evidences, becauſe ſome be in them, for ſo may other things alſo be; nor as touching them can ſealing be of any effect, but rather locking and not locking muſt make the difference touching them, if any difference by incloſure.

Of Things not actually in the Teſtator, but accruing to the Executors, by or after the Teſtator's Death.

Theſe are of divers ſorts, the firſt and chief whereof are things acquired by action or ſuit, ſecondly by condition or covenant without ſuit, thirdly, by remainder.

Of Things in Action.

As to the firſt, it is clear that debts due to the teſtator, be it by bond, ſtatute, or judgment, or for arrearages of rent, are not aſſets to charge the executor until receipt of them, and it is as clear that the actions to recover theſe do pertain to the executor, and that the debt and damages recovered ſhall be aſſets to charge the executor.

Alſo of actions of *detinue*, and of covenant for any thing perſonal, or any chattel real, leaſe, wardſhip or the like. But perhaps ſome will doubt of covenant touching inheritance, *viz.* the aſſurance of lands or enjoying thereof, free from this or that incumbrance or the like; yet even in this caſe, if the covenant were broken in the teſtator's lifetime, it is clear to me, that the action is accrued to the executor, for that his teſtator was to recover damages in the action of covenant for that breach, and he being entitled to theſe damages as principal, and

and not any acceſſary thing in that action, the law has caſt that action upon the executor; and that is the cauſe why, if waſte be committed in the life of the leſſor by his leſſee, and then the leſſor dies, his heir can have no action for this waſte, *viz.* becauſe he cannot recover the treble damage, as neither can the executor have it, for that he cannot recover *locum vaſtatum*, the place waſted, the inheritance whereof is in the heir.

That an executor at the common law could not maintain an action of treſpaſs for goods of his teſtator, taken away in his life-time, ſeems to be implied by the ſtatute *Ed.* 3. which gives ſuch action: it ſeems that a *replevin* was maintainable by the executor, at leaſt in ſome caſes for goods taken or diſtrained in the teſtator's life-time.

In caſe the diſtreſs were for rent or ſervice, it is ſaid a little after the making of that ſtatute, that the lord may not now avow for his rent or ſervice, becauſe his tenant is dead, but muſt ſet forth the matter, and thereupon juſtify to excuſe himſelf from anſwering damages, and the executor ſhall by this action recover the cattel or goods, and that by the common law, ſays the book, though the ſtatute of *Marlebridge* had never been made, for that the property remained in the teſtator.

Newton, in the reign of *Hen.* 6. would have it that the executor in that caſe ſhould not have a *replevin*, but an action of treſpaſs grounded upon the ſaid ſtatute, *viz.* 4 *Ed.* 3. which I think cannot be by any means, by reaſon of the ſtatute of *Marlebridge*, *cap.* 3. *Non ideo puniatur dominus*, &c. for the executor, as well as his teſtator, is thereby reſtrained, as I think, from the action of treſpaſs againſt the lord.

As for that no avowry can be made upon the tenant, that is now remedied by *Car.* 1. the other ſtatute hath been taken to extend to other things than goods moveable, for where a church becoming void, a ſtranger preſented thereunto wrongfully, and the patron died, it was reſolved in the reign of *Eliz.* that the executor might, by the equity of the ſaid ſtatute, maintain a *quare impedit*.

Whether an action of treſpaſs lies for an executor againſt him who ſpoiled the teſtator's corn, graſs, or wood growing, has been queſtioned, but no where reſolved to my knowledge.

It may lie with ſome difference: Firſt, for that the ſtatute of 4 *Ed.* 3. does not only ſpeak of goods carried away, as limiting the law to that treſpaſs ſolely and particularly, but ſpeaks generally of treſpaſs done to teſtators, and then brings in that particular of goods, as one inſtance.

There

There are many caſes of inſtances or examples given in acts of parliament, which yet do not reſtrain the remedy or *purven* to that particular, or from extending to other caſes of like nature.

The ſtatute likewiſe ſpeaks of treſpaſſes remaining unpuniſhed, which it meant to redreſs: but it ſhould ſtill leave many unpuniſhed, if it ſhould have no larger extent than to that one ſingular treſpaſs, of goods taken away, *viz.* moveables.

The teſtator was clearly intitled to a recovery of damages for this other treſpaſs, which, if he had recovered, ſhould have come to his executor; and the things themſelves, all if felled in the teſtator's life, and part though not felled, ſhould have come to the executor, therefore alſo the damages recoverable in lieu thereof, out of which recovered, the debts and legacies of the teſtator are to be ſatisfied.

This action of treſpaſſes is a thing ſevered from the ſtate of the land, ſo as if the owner thereof had, after this treſpaſs done, aliened the land, yet had this action remained to him.

Here may be ſome differences probably taken, as firſt between a treſpaſs in deſtroying or taking away corn growing, and a treſpaſs in graſs or wood growing: for the firſt being of that nature, as that though the owner had a ſtate of inheritance in the land whereon it groweth, and ſhould have died before ſeverance and felling, yet it ſhoud have gone to the executor, and not with the land to the heir, therefore doubtleſs does the action for deſtroying or taking away thereof, accrue by the operation of law to the executor, in lieu of the thing taken or deſtroyed.

There are other actions of diſcharge, which as the teſtator himſelf in his life-time might have had, ſo may his executor after his death, viz. *writs of error*, *attaint*, *deceit*, *audita querela*, *identitate nominis*; the laſt is given by ſtatute.

Note. Whatſoever is regained by any of theſe ways, as unduely loſt by the teſtator, ſhall alſo be aſſets.

Special

Special Caſes pertinant to the Premiſes.

Chattels come to the Executors from the Teſtators, yet not Aſſets.

Aſſets which are no Chattels.

Things in Action, and in the Perſonalty turned into Chattels Real, & è contra.

As to the firſt, I exemplify thus: *A.* makes *B.* his executor, and dies, *B.* makes *C.* his executor, and dies. The goods left by *A.* to *B.* as executor, far exceeds his debts and legacies, or let us ſuppoſe no debts nor legacies of *A.* and that *B.* died much in debt above the goods he leaves, and did make no alteration of the property of the goods of *A.* but merely left them to *C.* his executor.

The goods which came to *B.* as executor of *A.* and ſo from *B.* to *C.* ſhall not be liable in law, to pay the debts of *B.*

If *A.* making *B.* executor, did alſo by his will give him all his goods, and he in his life-time made election to have them as legatee; or by his will did ſo diſpoſe of them, or appoint them to go, as the goods he had as executor could not be given or diſpoſed; by this election they were altered in property from being his as executor, and ſo as his own goods ſhould be liable to his debts.

Things in action could not be ſo given or diſpoſed, *viz.* debts, *&c.* yet if *D.* were indebted to *A.* 100*l.* and *B.* his executor took new bond of him or another for it, giving up the old bond, now was it become his own duty, and ſo ſhall ſtand in his executor.

Another inſtance of this: If *A.* patron of the church of *D.* grant to *B.* the next avoidance, the church becomes void, *B.* dies before he preſents, his executor preſents, and has the benefit of preferring his ſon or friend, yet ſhall this make no aſſets in his hands for payment of debts, for that he could not lawfully take money to preſent; but if *B.* had died before the church had become void, then, becauſe the executor might lawfully have ſold it, the value ſhould be aſſets in his hands, as I conceive, except perhaps the incumbent had died ſoon after *B.* ſo that the executor had not time to ſell it.

If, in the other caſe, a ſtranger had preſented and got his clerk admitted, and the executors of *B.* had in a *qua. imp.* recovered damages, the money ſo recovered ſhould have been aſſets.

As

As to the ſecond, *viz.* that ſome things may be aſſets in the hands of executors, which yet are no chattels; I ſhall give but two inſtances.

Firſt, where a man leaves a villain for years to his executors, and the villain purchaſes land in fee-ſimple, and the executor enters into the land; now has he fee-ſimple therein; and this land is aſſets for payment of the teſtator's debts.

If a man by will give lands in fee to his executors, to be ſold for performance of his will, theſe (before the money thereby raiſed) are aſſets, both for payment of debts and of legacies; but if the lands had been given to be ſold only for payment of debts, they ſhould only be aſſets for that purpoſe, and not for payment of legacies: and ſo if it were expreſſed to be for payment of legacies ſingularly, this ſhould not be aſſets for debts.

Since theſe are not aſſets of their own nature, but ſo made by the will and diſpoſition of the teſtator, I think they cannot be otherwiſe nor farther aſſets than as the teſtator has willed and diſpoſed; but though lands thus given were aſſets before *ſtat.* 21 *H.* 8. *c.* 5. yet, how can it be ſo, ſince the very words of the ſtatute are, That if one will, by his teſtament or laſt will, any lands *&c.* to be ſold, neither the money thereof coming, nor the profits taken, ſhall be accounted as any of the goods or chattels of the teſtator's, which I conceive to be all one as to ſay, that they ſhould not be aſſets; for when an executor denies himſelf to have aſſets, the form of his plea is, *Quod nulla habet bona nec catalla*, &c.

As for the third, *viz.* the changing of things out of the perſonalty, into the realty, *& e contra*, I ſhew it thus: If a debt were due to the executor, as executor, by ſtatute, recognizance, or judgment, and he ſue execution, and have land of the debtors in extent: now is the perſonal duty turned into a chattel real.

On the other ſide, if ſuch an eſtate by extent, or a leaſe for years mortgaged come to an executor, and the debtor or mortgagor pays the money due; now are theſe real chattels turned into aſſets perſonal.

A ſpecial Caſe of Equity oppoſing Law.

If *A.* be bound to *B.* by bond, ſtatute, or recognizance for aſſurance of land, *B.* dies, and the land deſcends to his heir; or be it that *B.* ſold the land to *C.* and aſſigned to him the bond, ſtatute, *&c.* yet muſt the ſuit, or taking out of execution, be in the name

of the executor of *B.* and neither of the heir, nor alienee. And that which is recovered, or gotten in extent, will be aſſets in law to charge the executor, yet in equity it pertains to the heir or aſſignee.

Quære, if the executor meddle not, but only ſuffer his name to be uſed.

Of Things coming to Executors by Condition.

Firſt, we will conſider of conditions bringing back to executors goods or chattels granted away by their teſtators.

Concerning which, there is no doubt, but if the condition be any other than for payment of money, or other things valuable by the teſtator, or his executor, the chattel returning to the executor is aſſets in his hands: as ſuppoſe a leaſe for years, horſes, ſheep, plate, or other chattel, were granted by the teſtator to *A.* upon condition, that if *A.* did not pay ſuch a ſum of money, or do ſuch other act as the teſtator appoints, and this condition is not performed after the teſtator's death, now is the chattel come back to the executor, and is aſſets.

The queſtion is, where the condition is, that the teſtator, or his executor, ſhall pay the money to make void the grantee, and accordingly, the executor after the teſtator's death pays the ſum out of his own purſe, not having any money of the teſtator's in his hands.

By *ſtat.* 21 *Hen.* 7. it was reſolved, that this redeemed chattel ſhould not be aſſets, but be to the executor as his own proper goods, though three judges were of a contrary opinion, *viz.* that the goods redeemed ſhould be in the executor as goods of the teſtator.

If the executor redeem by payment at the day with the teſtator's own money or goods, none will doubt, but that the thing redeemed is in him as executor, and the money by him paid for redemption is well adminiſtred, the goods redeemed being of better value.

This way it makes no difference, whether the whole value of the goods redeemed ſhall be held aſſets; and the money paid for redemption ſtand drowned therein, or that that ſum be ſtill adjudged in the hands of the executor as aſſets, and only the ſurpluſage of the thing redeemed over and above the ſum paid for redemption.

Things accruing by Covenant or Aſſumption.

If *A.* covenant with *B.* to make him a leaſe of ſuch or ſuch land, by ſuch a day; and *B.* dies before the day, and before any leaſe made, now muſt *A.* make the leaſe to the executor of *B.* and the leaſe ſo made to him ſhall be in him as executor, and conſequently as aſſets. This is proved by the judgment, in the caſe between *Chapman* and *Dalton*, in the reign of *Eliz.*

The like law, if *A.* aſſume upon good conſideration to deliver in to *B.* by ſuch a day, twenty quarters of malt, or ſo many loads of coals or wood, or any other wares or merchandiſe, and this is not performed in the life of *B.* but after to his executor, it ſhall be to him as executor, and ſhall be aſſets in his hands, as well as the money recovered in damages for not performing ſhould have been.

Of Things accruing by Remainder or Increaſe.

If a leaſe be made to one for life, the remainder to his executors for years, and he dies, this will be aſſets in the hands of his executors, though it were never in the teſtator.

The like law where a leaſe for years is by will bequeathed to *A.* for life, and after to *B.* who dieth before *A.* although *B.* never had his term in him, ſo as that he could grant or diſpoſe it, yet ſhall it reſt in his executor as his goods, and be aſſets,

As for a remainder for years, ſo in the teſtator, that he might grant or diſpoſe it at his pleaſure, no doubt can be thereof, though the ſame fell not in poſſeſſion to the teſtator in his life-time, yet no ſcruple nor doubt can be, but that this is aſſets to the executor, even whilſt it continues a remainder, and before it falls into poſſeſſion, becauſe it is preſently valuable and vendable.

If the ſheep, or other cattle of the teſtator do breed, *viz.* bear lambs, calves, colts, *&c.* after the teſtator's death, even theſe, which were never in the teſtator, ſhall yet be aſſets, and ſo the wool growing upon the ſheep after the teſtator's death.

To elucidate this head we will recite the following caſe: One leaves to his executor a leaſe for years of lands, worth 20 *l. per ann.* and the executor, keeping this in his own hands one year after the teſtator's death, does make thereof 30 *l.* in clear gain above all charges; now whether, as to a creditor, this whole 30 *l.* ſhall be aſſets, or only 20 *l.* and the caſe, ſimply thus put, ſhall be underſtood of an

occupying, and manuring without any ſtock of the teſtator's; and then if the executor did ſtock it with his own ſheep, or other cattel, as he muſt have born the loſs by rot or death; ſo it is reaſon, that, if the manurants prove gainful, he reap the fruits thereof in recompence of his adventure, and of his induſtry, ſkill, and good huſbandry.

If the teſtator's ſtock of ſheep and cattel were (as of neceſſity, or for the better advantage of the teſtator's eſtate) continued upon the leaſe land, then it is reaſon, that the gain or loſs, whichſoever of them Providence ſends, do redound to the teſtator's eſtate.

The like law, if an executor, finding that he cannot inſtantly, after the teſtator's death, let the leaſe land near the value, ſhall therefore buy ſeed-corn, and hire the plowing, &c.

It may be ſaid, that the leaſe has one entire valuation at the firſt, upon the appraiſement.

To this I anſwer, that the value upon the appraiſement is not binding, nor much reſpected at the common law; if it be too high, it ſhall not prejudice the executor; if too low, ſhall not advantage him; but the very value found by jury, when it comes in queſtion, whether the executor has fully adminiſtred, or have aſſets or not, is that which is binding.

Next I ſay, that if a long leaſe come to executors, of land worth 100*l. per annum.* and no ſale is made thereof by the ſpace of a year or more, now the term continuing of the like value, as at firſt, it is no reaſon but this 100*l.* raiſed the firſt year, ſhould go towards the payment of debts and legacies rather than any of them ſhould be unpaid. Theſe things, I mean the knowledge of them, are uſeful two ways, *viz.* firſt, to give light to executors, to diſcern what unto them of right pertains: next, to ſhew unto creditors and legatees, what and how far things ſhall be aſſets, that is to ſay, goods to enable, charge, and bind executors to pay debts and legacies. For whatſoever any of theſe ways comes to the executors from their teſtator, or is recovered by any of theſe actions, ſhall be in their hands aſſets, the coſt and charges of recovering deducted.

What manner of Intereſt an Executor has in his Teſtator's Goods and Chattels, and how different from the common Intereſt they or others have in their own proper Goods.

The intereſt which an executor has as executor in the goods of his teſtator is much different from the abſolute, proper, and ordinary intereſt, which every one has in his own proper goods, as may well appear in and by theſe points: Firſt, although if a ſtanger take away theſe goods, the action of treſpaſs for the executor is of general form, *quare bona ſua cepit*, calling them his goods, whereas a man outlawed in debt, *&c.* or convict or attainted of felony or treaſon, forfeiteth all his own goods, yet theſe which he has as executor ſhall not be forfeited.

If a villain be made executor, his lord cannot take theſe goods, though he may take all the villain's own goods: and for taking ſuch goods, or for a debt due to the teſtator, a villain may ſue his lord.

If the executor grant all his goods, it has been held, that theſe which he has as executor ſhould not paſs; Lord *Dyer* ſo held in the reign of *Eliz.* with this difference, *viz.* where the grantor is named executor in the grantee, there the goods which he has as executor ſhould paſs, but otherwiſe if he be not named executor in the grantee, and that this opinion is probable will further appear by that which follows.

Secondly, the executor cannot by will give or bequeath the goods he has as executor, and if he die inteſtate and adminiſtration of all his goods is committed to *I. D.* yet has he nothing to do with the goods which the inteſtate had, as executor to his teſtator: thus all his goods reach not to his goods as executor.

Thirdly, where a man's goods ſtand liable to the payment of his debts, both in his life-time and after; the goods which a man has as executor are not to be taken in execution for his own debts, either upon a recognizance ſtatute or judgment had againſt him.

If ſuch a one die indebted, leaving to his executor much goods, which he had as executor; theſe are not aſſets in his hands, liable to payment of his debts, but only for the payment of the firſt teſtator's debts or legacies. Therefore a *quo min.* brought by an executor, ſhewing that he was not able to pay the King's debt, becauſe the defendant detained from him 100*l.* which he owed him as executor to *I S.* was overthrown, for that it could not be intended, that the King's debt could be ſatisfied with that which the plaintiff ſhould recover

recover, and receive as executor. Whereas a woman being poſſeſſed of any chattels perſonal, *viz.* moveable goods, all be diveſted out of her into her huſband by her marriage, ſo as if he die, and ſhe ſurvives him, they are not her's again, but her huſband's executor's, or adminiſtrator's, and if ſhe die, all are the huſband's, without being executor to his wife. It not ſo of the goods which ſhe has as executor, theſe ſtill remain in and to her, if her huſband die, and if ſhe herſelf die, for that ſhe has them as it were in another's right, *viz.* as ſhe repreſents the perſon of her teſtator, her huſband ſhall not have them, if he be not his wife's executor, and ſo executor to her teſtator.

Laſtly, whereas the writ of treſpaſs ſeems to make no difference between one's own goods, and thoſe he has as executor, that being a poſſeſſory action or ſuit grounded upon the poſſeſſion; yet come to an action of debt, which participates of the right, and there are they differenced: for where for my own debt, when I ſue, the writ ſays, *debet & detinet*, viz. that the defendant owes me, and detains from me that ſum. Yet, when I ſue as executor, the writ ſays not *debet*, he does owe me, but *detinet* only, he detains from me, as admitting that he is not the debtor to me, though he ſhould pay me; and ſo where I am ſued as executor, the writ makes me not a debtor, but a detainer; otherwiſe where, in my own right, I owe and am ſued for a debt.

Where judgment in an action of debt is given againſt one as executor, it is not generally that the plaintiff ſhall recover againſt him, but he ſhall recover of the goods of the teſtator, and therefore upon this judgment no *capias* lies againſt him, to enforce him to pay by arreſt of his body, becauſe he is not properly debtor; but if after it be returned that he has waſted the teſtator's goods, out of which the ſaid debt ſhall be ſatisfied, then, he having made himſelf a debtor, a *capias ad ſatisfaciendum*, ſhall be awarded againſt him, and then he ſhall be taken in execution.

Alſo in ſome caſes of falſe plea pleaded, for where the judgment is *de bonis propriis*, the plaintiff may have a *capias ad ſatisfaciendum*, and that judgment is in divers caſes for the damages, although not in many for the principal. As for the *capias* before judgment, in the meſne *proceſs* againſt an executor, that is, becauſe of his contumacy in not appearing upon the former *proceſs*.

The reaſon of this different intereſt between an executor and another, or between the ſame man's having goods as executor, and others in his own right; as alſo of the different manner of one's being indebted as executor, and otherwiſe in his own right, is well expreſſed by the Lord *Coke*, in *Pinchon*'s caſe, *viz.* that the goods which one has as executor, he has not in his own right, but in *auter droit*, that is

in

in the right of another, meaning his teſtator. Secondly, that executors are but the miniſters, and diſpenſors, or diſtributors of their teſtator's goods.

Of alteration of Property in the Executor's Hands, ſo as ſome Goods become his own which he had as Executor.

In treating of the difference between the intereſt in goods, as executor, and other, had merely in one's own right, and to his own uſe, it will not be improper to conſider how that which one has at the firſt as executor, may be changed in property, and become the executor's own to his own uſe, as other his goods which he had not as executor.

Let us firſt conſider of ready money left by the teſtator; for ſince pieces of money cannot be known one from the other, it muſt neceſſarily follow that theſe coming to an executor from the teſtator muſt in ſome ſort be altered in property, ſo as though the executor ſhall be ſaid to have ſo much in money or value, yet can it not be diſcerned which money in his houſe was his teſtator's, and which his own. Conſequently the ſheriff, upon the *fieri facias*, for a creditor who has recovered againſt the executor a debt owing by the teſtator, cannot take away money in execution as the teſtator's.

If an executor amongſt his teſtator's goods, find and take ſome, not his, and after theſe being claimed by the owner, who left them in the cuſtody of the teſtator, the executor, not crediting the claim, ſtill keeps them, and the owner thereupon recovers damages in an action of treſpaſs, or of *trover* and *converſion*; now (and ſo in all other like caſes) are theſe goods become the treſpaſſer's in property, becauſe he has paid for them; therefore it is not ſtrange, if in like manner an executor, paying out of his own purſe for or in lieu of the teſtator's goods, have ſo much of them, (where no certainty) changed in property and become his own.

Of ſome Caſes and Queſtions between the Executor and the Heir.

The executor may in convenient time after the teſtator's death enter into the houſe deſcended to the heir, for the removing and taking away of the goods, ſo as the door be open; or at leaſt the key be in the door: and this I underſtand of the door of each room; for, although the door of entrance into the hall and parlour be open, the executor cannot by that juſtify the breaking open of the door of any chamber to take goods there, but only may take thoſe in the rooms which are open; and this is proved by the caſe of the cheſt with evi-

dences,

dences, which, ſays the book, the executor may take and put out the deeds, delivering them to the heir, *viz.* the cheſt being unlocked.

A chamber or other room within a houſe locked, is an incloſure of better reſpect than a cheſt. but if the goods be not removed within convenient time, the heir may diſtrain them as *damage feaſant.*

Where the teſtator recovered land and damages, or a deed and damages, he dying before execution, the heir ſhall have execution for the land or deed, and the executor for the damages; by *Ed.* 4. it is ſaid, that until the heir ſue a *ſci. fac.* the executor cannot ſue execution for the damages.

If a creditor be made executor by his debtor, and pay himſelf part out of the goods, he cannot ſue the heir for the reſt, becauſe the debt cannot be apportioned, but otherwiſe he may, ſays the book.

If a debt be recovered againſt one who dies before execution ſued, leaving goods ſufficient to ſatisfy: now ſhall not the land deſcended to the heir be charged therewith, nor, by like reaſon, any land conveyed after judgment.

How Executors ſtand between themſelves, and in repreſentation of or relation to the Teſtator, as his Aſſignee or Deputy, or as the ſame Perſon with him, and where and to what Purpoſe, as other Perſons.

Firſt, all of them do repreſent the perſon of the teſtator, and therefore they muſt all join in ſuit againſt others, and in ſuit by others they muſt be all made defendants, or at leaſt ſo many of them as do adminiſter: for though the executors themſelves muſt take notice by the will how many executors be, and muſt frame their ſuit accordingly, creditors and ſtrangers need not take notice of any more then do adminiſter, and execute the office of executors.

In the time of *Ed.* 3. where two executors were of a term, and the reverſion was granted by fine, mentioning but one termor, and thereupon a *quid juris clamat*, accordingly brought againſt that one executor, this was held good, though the other executor was not named in the ſuit; becauſe that one (who indeed was teſtator's wife) did only occupy the land, and take the profits thereof; for elſe, ſince all the executors do repreſent the teſtator's perſon, all muſt have been named. Therefore did the judges reſolve in the time of *H.* 4. that where a leſſee for years made two executors, and one of them was diſtrained by the lord for rent, who avowed upon the leſſor, that executor

executor ſhould have aid of his fellow executor, to the end that both might have aid of the leſſor which one alone could not. And upon this reaſon, *viz.* that the executors repreſent the perſon of their teſtator, as one perſon.

It was enacted in the time of *Ed.* 3. that the executors, though never ſo many, ſhall have but one *eſſoign*, neither before appearance nor after, becauſe their teſtator, whoſe perſon they repreſent, could have had no more.

It is further alſo enacted by the ſaid ſtatute, that where two or three executors or more be, they being ſued in an action of debt, tho' all do not appear; yet ſuch one of them, or more, as do or doth appear at the *grand diſtreſs*, ſhall anſwer alone without his companions. And this ſtatute has been taken by equity in three reſpects:

Firſt, touching the perſons; that it ſhall extend, not to executors only, but alſo to executors of executors, and to adminiſtrators alſo, though the ſtatute ſpeaks only of executors.

Secondly, touching the actions: whereas the ſtatute ſpeaks only of the action of debt, it is taken by equity to extend to other actions, as the writ *de rationabili parte bonarum*, and *detinue*, yet perhaps, this latter action will be ſaid not to be maintainable againſt executors, for their teſtator's act, but for their own only; but we yet are not come ſo far as to determine what is maintainable; but whether, before all the executors do appear, he, or they which have appeared, ſhall be put to anſwer; and ſo to bring it to deciſion, whether the action be maintainable or not.

In actions of covenant, and all other actions againſt executors, as executors, he who appears muſt anſwer without his companions.

As for the *ſubpæna* againſt executors, which is to make them to anſwer to a ſuit in equity, that has been taken, in the time of *E.* 4. to be out of the reach and intent of the ſtatute.

Alſo of the *latitat* in the *King's Bench*, as was held in the ſame King's reign, except all the executors, making up the whole repreſentative body of the teſtator, be in the cuſtody of the marſhal, one or more of them who are there ſhall not be enforced to anſwer.

Thirdly, that ſtatute is extended by equity to other writs or proceſs; for where the ſtatute ſpeaks only of the *grand diſtreſs*, and the executors appearing thereupon; it has been many times ruled, that when he or they appear upon the *attachment*, *capias* or *exigent*, anſwer muſt be, though the reſt appear not; for ſo the word *diſtreſs* is taken

taken for all compulſory means or inforcement of appearance. But where the ſtatute reaches not, *viz.* when the proceſs is determined againſt one or more, as by outlawry, *&c.* there the reſt muſt anſwer by the rules of the *common law*; except it be in the caſe of huſband and wife executor, for there the wife cannot anſwer without her huſband, nor can he without her, where ſhe and not he is executor; but where both be executors, there he may anſwer without her, but not ſhe without him.

When executors as defendants have appeared, if any one of them will confeſs the action, this binds and concludes the reſt; but if one will plead one plea, and the other another, that ſhall be received which is beſt for the teſtator's eſtate; ſo where they ſue, ſuch as will not proſecute ſhall be ſevered, and the reſt without them may proceed; and in like manner where they pray to be received to defend their term, and one of them after makes default; it ſhall not be the default of all, but the reſt, or he, if it be but one who appears, ſhall be received to uphold the defence of the term.

Where they plead a releaſe to the teſtator or themſelves, one after making default, this ſhall not be, nor make a total default in the executors, to induce a judgment or condemnation againſt them, yet, each executor has the whole of the teſtator's goods and chattels, be they real or perſonal, and each may ſell or give the whole. One of them cannot give nor releaſe to the other his intereſt, and if he do, it is void, and he who releaſes ſhall ſtill have as much intereſt as he to whom he releaſed, becauſe each had the whole before, upon this reaſon, where one of the two executors releaſed but his part of a debt, it was held that the whole was diſcharged: if one executor grant his part of the teſtator's goods, all paſſes, and nothing is left to the other, for that each has the whole, and there are no parts or moities between executors; therefore, though a leaſe for a thouſand years, of a thouſand acres of land, come to two executors or more, no partition or diviſion can be made between them, becauſe it is not between them as between joint leſſees of land, where each has but a moiety in intereſt, though poſſeſſion of or through the whole.

Amidſt executors, each has the whole, and therefore if he grant his part he grants the whole.

One executor may demiſe or grant the moiety of the land for the whole term, and ſo may the other do, and this way they may ſettle in friends or others truſted for them, a moiety for each, either in ſeveral or undivided; but one of them cannot make a leaſe to the other of any part, for he had the whole, nor can one ſue the other as executor, yet if the teſtator deviſe to one of his executors all his goods, after ſuch debts and legacies ſatisfied, there, after thoſe ſatisfied, that executor may take the goods, and maintain an action of

treſpaſs againſt the other executor, if he take them from him, and conſequently an action of *detinue*, for keeping or detaining them: but this is as legatee, his own aſſent perfecting the legacy.

The poſſeſſion of one executor is the poſſeſſion of all the reſt; ſo as if one appearing to a ſuit, and the other making default, in whoſe hands all the goods are which are not adminiſtered, if here he that appears, pleads that he has nothing in his hands, this ſhall be found againſt him; for whatſoever any of the co-executors has, he alſo has, and is in his poſſeſſion, and ſo ſhall the creditor recover, and have judgment to be ſatisfied out of the teſtator's goods, as in his hands. And therefore if goods be taken from one, all may maintain an action of treſpaſs thereupon; for the poſſeſſion of one, is the poſſeſſion of all.

Where two executors are made, the one making a will and executors, and dying, if the other die after inteſtate, now ſhall not the executor of him who firſt died be executor to the firſt teſtator, but he is dead inteſtate, becauſe the ſurviving executor is ſo dead; and in him the executorſhip was wholly and ſolely ſettled by the death of his fellow before him: ſo adminiſtration, *de bonis non admin.* ſhall be committed.

The executors, or executor, if but one, ſo repreſents the perſon of his teſtator, that he is in law his aſſignee by the very making of him executor; ſo as if one covenant to make a leaſe to *I. S.* and his aſſigns by ſuch a time, and *I. S.* dies before that time, and before the leaſe made, now muſt the leaſe be made to his executors as his aſſignee, repreſenting his perſon; ſo alſo in a condition to pay to the feoffor or his aſſignee, yet a leaſe to *A.* and his aſſigns during the life of *B.* ſhall not go to the executors of *A.*

Where in a general pardon by parliament, there is an exception of perſons outlawed after judgment, the perſon ſo outlawed ſhall ſatisfy the creditor, who has outlawed him. If the outlaw die before this done, his executor, as repreſenting his perſon, may make ſatisfaction, and ſo make the benefit of the pardon to extend to his teſtator, for ſaving his goods, as if himſelf had ſatisfied his creditor, though he left him unſatisfied when he left the world.

Where *A.* ſold land to *B.* upon *proviſo*, that if he paid to *B.* his heirs or aſſigns, *&c.* *B.* died, *A.* paid at the day to his executor, and it was doubted that it was not good, for the word aſſignee could not reach to him, being no aſſignee of the land.

Where the executor brought an action of account upon a receipt by the hands of the teſtator, the defendant could not be admitted to wage his law; for that this was held a receipt *per auter mains*; yet,

it is clear, that if one by bond or covenant tie himſelf to pay ſuch a ſum at ſuch a day, not mentioning his executor at all, yet is the executor bound, as included in the name or perſon of the teſtator.

Where *ſtat.* 23 *Hen.* 8. gives the writ of attaint (in the courſe there mentioned) againſt the party that had judgment, it lies againſt his executors if he be dead; but thereof another reaſon is given, where a man was bound, that he would not ſue upon ſuch a bond, and he died, and his executor ſued; this was held to be no forfeiture of the bond.

Where one was bound to pay 10*l.* within a month after requeſt made to him, and he died before requeſt; it is not ſufficient to make it to the executor.

It was likewiſe held, that the warrant of attorney put in for the plaintiff in debt, is not ſufficient for his executor to bring a *ſcire fac.* upon the judgment.

If executors ſue execution upon a ſtatute in the name of a conuſee, as if he were alive, this is void, and they may ſue out a new extent, and this they may do without any *ſcire facias*, as well as the conuſee might if he had been alive. *Huſſey*, Juſtice, If the conuſor in a ſtatute-ſtaple be returned dead by the ſheriff upon the extent, a *ſcire fac.* muſt be ſued out before extent proceed; and upon a judgment had, if the recoverer die before execution, his executor cannot, as himſelf might, ſue out execution without a *ſci. fac.* as is there ſaid; yet if, after a *capias ad ſat.* awarded, the plaintiff die before it be executed, the ſheriff may proceed to the taking of the party, and is not ſubject to any action of falſe impriſonment, nay, if he ſuffer him to eſcape, he is chargeable.

If the defendant, in an action of debt upon a bond, plead a render at the time and place of payment, and tenders the money in court, where it reſts and then he dies, now ſhall not the plaintiff have this money, becauſe the property thereof is changed, and become the executors, and he is put to a new ſuit againſt the executor.

Where judgment is once given in a writ of partition for a termor, or in a writ of account, if the plaintiff die before the ſecond judgment needful in both caſes, the executor is not put to a new ſuit, but may proceed by *ſci. fac.* upon the former judgment, as Lord *Anderſon* held upon the motion of *Fenner*, ſerjeant.

Stat. 23 *H.* 8. gives coſts to a defendant againſt a plaintiff, ſuing for a wrong or breach of promiſe, or the like, done to the plaintiff againſt whom it paſſes by verdict or nonſuit; it has been reſolved,

that an executor ſuing upon ſuch wrong, or breach of contract to his teſtator made, ſhould not pay coſts, becauſe he is another perſon than the teſtator, and ſo is it uſual in experience. But if in ſuch ſuit the attorney of the executor miſbehave himſelf towards him, and for this the executor ſues him, here if it paſs againſt him in manner as aforeſaid, he ſhall pay coſts, becauſe this was a ſuit for a wrong done to himſelf.

If *A.* recover a debt as executor of *I. S.* and makes *B.* his executor and die before execution ſued, *B.* is not put to a new ſuit, but may have execution upon that judgment: but if *A.* or *B.* died inteſtate, now could none as adminiſtrator to either of them, nor as adminiſtrator of *I. S.* have execution of this judgment; for the former has no intereſt in any thing pertaining to *I. S.* and the latter comes to title above the judgment, *viz.* as immediate adminiſtrator to *I. S.* who died inteſtate, and derives no title from the executor, who recovered.

If a conuſee have a certificate in *Chancery*, upon a ſtatute, and then dies before extent taken out, his executor is put to a new certificate, and, for obtaining of it, muſt make affidavit that no extent has yet been taken out.

If an alien join with his wife, who is executor in a ſuit for debt, and it comes to iſſue, he ſhall not have trial *per medietatem alienig.* or *linguæ*, as ſhould be if he otherwiſe were party to a trial.

If one executor only ſell goods of the teſtator's, he alone may maintain an action of debt for the money.

If goods be taken out of the poſſeſſion of one executor, he alone may maintain an action, and that without naming himſelf executor.

Some obſervations have been made of ſummons and ſeverance, whereabout be this added.—If one executor will not, or cannot join in ſuit with the other, ſo as he is ſummoned and ſevered, now by his death, after the ſuit is not abated, 16 *Ed.* 2. *Fitzh.* 111. yet if he live till judgment he may ſue execution, ſay other books, 13 *Ed.* 3. *Fitzh. Exec.* 9. 11. *R.* 2. *Priviledge* 2. yet *que.* of that, for he cannot acknowledge ſatisfaction, as has been ſince reſolved.

Of the Poſſeſſion of Executors, or their actual having.

What ſhall be ſaid ſo to come to their hands, as to charge them.

What ſhall be ſuch a getting or going from them as to excuſe them.

Touching things perſonal, in which the executor has ſuch an actual poſſeſſion, preſently upon the teſtator's death, as that he may maintain an action of treſpaſs againſt any ſtranger taking them away or ſpoiling them, though he nor any for him ever came near them; whether yet this ſhall be ſuch a poſſeſſion in the executors, and ſuch a coming uf theſe goods to their hands, as to charge them with payment of debts and legacies, yet to make their own goods liable inſtead of theſe, is a point worthy of conſideration.

This, throughly ſifted, will prove a caſe miſchievous, which way ſoever the law be taken; for firſt it muſt be admitted, that without the executors laying his hands actually and particularly upon the goods in the houſe or fields of the teſtator, whither the executor has reſorted, he ſhall be ſaid ſo in poſſeſſion, as to ſtand liable unto the creditors, ſo far as they extend in value, though after others purloin and embezzel them. Now then, if diſtance of place ſhall make difference, where ſhall be the bound and limit of that diſtance? And if the executor may come at a ſtranger's taking or poſſeſſing of goods, it is miſchievous to creditors.

If it ſhall be laid upon the executors to anſwer for all the goods whereof the teſtator died poſſeſſed, it will be miſchievous for them, and deter them from taking executorſhip upon them, ſince much purloining may be, even of money, jewels and goods, by ſervants and others, about the teſtator, or where theſe things are. I think therefore, that if without any fraud, colluſion, or voluntary conniving on the part of the executors, they be prevented by others, of laying hold on the teſtator's goods, ſo as that they may diſpoſe of them; eſpecially, if it cannot be known by whom they are ſo purloined and embezzled, or if they be perſons fled, or inſolvent, that then they ſhall not ſtand upon their ſcore, as goods come to their hands, in reſpect whereof, creditors or legatees ſhall draw ſo much from them, even out of their own goods, as in other caſes, where they have, no ſuch excuſe ſhall be.

And of this opinion I the rather am, becauſe I find the whole realm in parliament taking notice of ſuch prevention of executors coming to the goods of their teſtator, by the wrongful act and embezzlement of others, without any default in themſelves.

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In this caſe the parliament has given ſpecial remedy, *viz.* that writs ſhall be directed to ſheriffs, to make open proclamation for the appearance of the parties delinquent in the *King's Bench*, at the day limited, and in default thereof they ſhall be attainted there of felony, the writ being returned executed, *viz.* proclamation made.

Note, This proclamation is to be made two market days, within twelve days next after the delivery of the writ, and the laſt proclamation muſt be fifteen days before the day of appearance. And theſe proclamations muſt be made in ſuch cities, boroughs, or places in which the act or offence is committed; ſo that if the fact be not committed within the limits of ſome city, borough or market town, no remedy is to be had by the ſtatute; for that the proclamation is to be made upon market days, in the place where, *&c.*

Now beſides other places, even ſome boroughs, *viz.* towns ſending burgeſſes to parliament have no markets, and ſo are no places within the act.

Two executors muſt require this writ, therefore where there is but one executor, no relief is given by this law, for it is penal, making felony, and therefore ſhall not be extended by equity beyond the words.

Laſtly, it extends but to the executors of lords and perſons of good degree, and only to the treſpaſſing ſervants of ſuch perſons, not to other ſtrangers purloining the goods.

The ſaid ſtatute ſeems in ſome ſort to imply an opinion this way, in that it expreſſes this purloining to be an impediment of the execution of the will, whereas if the executors ſhall anſwer and make good to creditors and legatees, out of their own eſtate and goods, for theſe embezzled, the execution of the will is not hindered, but the executors are damnified in their own private value, yet it may be ſaid on the other ſide, that ſome things given in *ſpecie* by the will, ſuch a piece of plate, ſuch furniture of a bed or chamber, ſuch a jewel may be purloined, ſo that the legatees can never have them, and conſequently the execution of the will is hindered, though ſome recompence be made by the executors.

If the executor be of ſecret aſſent to this embezzelment, whereof even the forbearance to ſue for the recovery of the things, or the value of them in damages, if known where they or the embezzellers are, is a ſhrewd evidence or poof. Then ſhall the executor be adjudged an haver of them, and ſo ſtand charged as having them.

Of Goods loſt by or gotten from Executors.

Put the caſe that goods come fully into executors poſſeſſion, but be again loſt or gotten from them without any default in them; ſhall they yet ſtand anſwerable out of their own eſtates for them? Concerning which we will make two diſtinctions.

The firſt I derive from our learning touching eſcapes of perſons taken in execution and impriſoned. If ſuch be reſcued by alien enemies, the ſheriff or gaoler ſhall not anſwer out of his own goods for this debt; otherwiſe if it be done by ſubjects, againſt whom remedy is to be had by the courſe of juſtice.

Another difference may probably be taken from the rules of our learning touching bailment.—If *A.* deliver goods to *B.* to keep as his own, or generally, *viz.* without any ſpecial undertaking by *B.* to keep them ſafely, and without any money or other valuable conſideration, given for the ſafe cuſtody; here, if *B.* be robbed of them, he ſhall not make ſatisfaction to *A.* for them; and ſo if they be ſtolen from a ſervant or factor.

If they be taken away by a known treſpaſſer, not felonioufly, the opinion is, that the keeper ſhall make recompence, becauſe he has remedy for recompence, or ſatisfaction from the treſpaſſer; yet of this latter I ſhould doubt, becauſe *A.* himſelf, as well as *B.* may have this action for damages againſt the treſpaſſer.

An executor is of the nature of ſuch one having the cuſtody of another man's goods; and I have ſeen in a manuſcript entire, the writ of treſpaſſer by the executor, expreſſing goods of the teſtator, in the cuſtody of the executor to be taken from him; therefore I think he ſhould no otherwiſe be charged than *B.* to whom goods were, as above is ſaid, delivered to be kept. For the executor happly ſhall have no benefit nor advantage by the executorſhip, all the goods not ſufficing perhaps to pay debts and legacies, which is the ſtate we moſt think of, *viz.* where goods want to pay debts and legacies, for where there wants not, the queſtion need not be made.

A ſervant or factor, who has wages for his ſervice, is not thereby made liable to ſatisfy for things in his cuſtody ſtolen, becauſe he has not any compenſation for this particular cuſtody; ſo of an executor, if perhaps benefit might accrue to him by the executorſhip, as happly the diſcharge of a debt owing by himſelf, &c.

Other caſes there be, wherein the executor will ſtand more clearly diſcharged.—As if the teſtator left a leaſe for years, eſtate, by extent,

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wardſhip, or other goods whereto he had but a defeaſible title, and they be evicted after his death. So if he left a ſhip at the ſea with much goods and merchandiſes, which are drowned in the return. Alſo if he left a flock of ſheep tainted with the rot, which die ſhortly after him, in none of theſe three caſes ſhall the loſs fall upon the executor.

How far and where an Executor having Aſſets is chargeable or liable to Action.

Having conſidered what things ſhall come to executors and be aſſets in their hands, for the performance of the will; let us now conſider what thing the executor is bound to pay, ſatisfy or perform, and what not, where he is chargeable, and where not, this being admitted, that he has aſſets, *viz.* ſufficient wherewith to perform.

We will here conſider of theſe different parts following.

Of debts by ſpecialty or record.

Debts or duties by contract without ſpecialty.

Debts without either contract or ſpecialty.

Covenants by deed or ſpecialty.

Wrongs done by the teſtators.

Concerning debts by ſpecialty, which are the moſt uſual and common obligements, it will not be impertinent to give a little light touching the validity of a ſpecialty, and the extent of it to executors. The moſt doubt will ariſe upon bills, and ſuch writings obligatory made, not by ſcriveners, nor clerks in common form, but by others otherwiſe for haſte, or through ſimplicity. For example, a writing made by *A.* to *B. Memorand.* that I have received of *B. ten pounds*, which I promiſe to pay, *&c.* This, being ſealed and delivered, was held a good obligation by *Brian* and *Cateſby*. So if the words had been only, I ſhall pay to *B. ten pounds*, and whether ſuch words or the like, as covenant, or grant to pay, be in the form of a bill or bond, or in an indenture or articles, it a ſufficient ground for an action of debt. And though it ſhould be miſwritten *Wigint.* for *Vigint*, or *fitteen* for *fifteen*, yet ſhall it be favourably conſtrued and held a good ſpecialty of debt, as has been reſolved in theſe and like caſes; and ſo alſo notwithſtanding falſe Latin in the obligation, or the plural number for the ſingular number, or words of repugnancy or nonſenſe, yet if there be words whereby it appears that *A.* is a debtor to *B.* and it be

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ſealed and delivered, it is a good writing obligatory; though it want the words of concluſion, *viz.* in witneſs whereof.

Now any ſuch writing obligatory doth determine or drown any duty by contract, becauſe ſpecialty is of a higher nature, ſo as if *A.* and *B.* do bargain with *C.* to pay him 100 *l.* for corn or other thing, and after *C.* takes ſome ſuch writing obligatory as aforeſaid of *A.* now by this is *B.* diſcharged of the debt, becauſe he ſtood charged only by the contract, which is extinguiſhed by the ſaid ſpecialty.

As for the extent and operation of the ſpecialties, to and upon executors, we muſt know that an executor does ſo repreſent the perſon of the teſtator, and is ſo included in him, as that every bond or covenant by the teſtator made for payment of money, or the like, reaches to the executor, although he be not named, *viz.* that he does not covenant for nor bind him and his executors by expreſs words (and yet the heir not named is not bound, though there be never ſo great aſſets, or land deſcend unto him.)

Touching debts upon record, much need not be ſaid (except thoſe by ſtatute-merchant) for to debts and damages already recovered againſt the teſtator, and to debts by recognizance the executors liableneſs is ſomewhat clear and conſpicuous. Yet other inferior debts upon record may fitly be thought of, as iſſues forfeited, fines impoſed by juſtices at *Weſtmin.* or at aſſizes, quarter-ſeſſions, commiſſions of ſewers of bankrupts, by ſtewards in leets, or the like; for all theſe are debts of record, which executors ſtand charged with.

If the teſtator were before auditors found in arrearages of account, being a bailee, or receiver; for theſe auditors are, by ſtatute, judges of record, but if the account were made only before the party to whom the arrearage pertained, or but before one auditor only, it is out of the ſtatute, which ſpeaks of accounts before auditors in the plural number. Therefore the executor is not chargeable, becauſe the teſtator might wage his law in thoſe caſes, not in the former.

Of Debts by Contract without Deed, as Leaſes Parol, &c.

Contracts are of divers kinds, and we will begin with thoſe in the realty, as moſt worthy.

If one be leſſee for years, or for life, without any indenture or deed (as he may be) and his rent being behind, he dies, now is the executor liable to the payment of this rent, without any ſpecialty, for that his teſtator, if he had been ſued in his life-time, could not have waged his law. But if the leſſee for years in his life-time ſell or

grant away his term or leaſe, although he lie at the ſtake for the rent, to grow due after, until the leſſor accept the aſſignee for his tenant; yet if the leſſee die, his executor ſhall not be charged for any rent due, after the death of his teſtator. But what if the leſſee do not alien or aſſign his term, but die thereof poſſeſſed, and the executor, perceiving the land not to be worth the rent, waiveth the ſame; yet the leſſor will not enter thereinto, nor intermeddle therewith; whether may he yet charge the executor with the rent, during the term? I anſwer, that if he have aſſets, that is ſufficient for payment of this and other debts, he cannot waive this leaſe, but ſhall be tied to anſwer this rent, though much more than the land is worth, for the taking of the leaſe is much of the nature of an obligation to pay money; yet becauſe it is yearly executory, the executor may waive it, in caſe his teſtator's eſtate will not ſupply and bear that loſs. But what if there be aſſets to bear this yearly loſs for ſome years, but not during the whole term? I think in this caſe the executor muſt pay the rent, ſo long as this aſſets will hold out, and then muſt waive the poſſeſſion, giving notice to the reverſioner; and this I think he may do well enough notwithſtanding his occupation of the land divers years after the teſtator's death, becauſe that was not voluntary, but as of neceſſity.

Of Contracts perſonal.

Where the teſtator might wage his law, there the action lies not againſt the executor; as hath been touched; and therefore he is not chargeable in an action of debt upon a ſimple contract, as by reaſon of this or that to his teſtator; yea though it were the inheritance of land, which was ſold, ſo as the ſale were without deed, or though by deed, yet if no counterpart were under the hand of him to whom the ſale was made.

By the cuſtom of *London*, the contrary, *viz.* that an action of debt ſhould be maintained againſt executors upon a contract, was held void, at leaſt no good plea againſt other creditors, that ſuch a debt was recovered againſt the executor; though ſuch a debt grew for the moſt neceſſary things, *viz.* meat and drink, which binds even an infant to payment, yet will it not charge the executor of a man of full age, but this is meant where the contract was only by word, for where the teſtator puts his ſeal to any deed or writing made upon ſuch ſale, this is more than a ſimple contract, and takes from the vendee his wager of law, and ſo charges the executor. But if the teſtator ſeal but unto a tail or tally, with ſcotches, expreſſing a debt, this is no ſuch ſpecialty as ſhall charge executors. Yet in ſome caſes, without any ſeal at all, the executor is chargeable. But though no action of debt lies againſt the executor upon ſuch a ſimple contract,

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yet may the creditor, in that caſe, maintain an action upon the caſe grounded, upon the aſſumption implied, though not expreſſed, as now ſtands reſolved by all the judges of the courts at *Weſtminſter*.

Where Executors ſhall be charged without either Contract or Specialty.

Where a priſoner owes money to a gaoler, or keeper of a priſon for his diet or victuals, and dies, his executor ſhall be chargeable for this debt, becauſe it is for the common wealth to have priſoners kept, which cannot be without affording them victuals.

So where one has a patent, or tally of the *Exchequer*, to receive money of ſome cuſtomer, receiver, or other officer of the crown, and delivers it to him, he then having money of the King's in his hands, if he pay not the ſame, but die, his executor ſhall ſtand chargeable with the payment thereof. So for arrearages of account before auditors, if more than one, but this is debt of record in law.

If any lord of free tenants, do levy aid of them for the marriage of his eldeſt daughter, and he die before ſhe be married, ſhe may recover this money by an action of debt againſt his executor.

There is a precedent in the book of entries of an action of debt againſt the executor of an heir, by which it ſeems, that a man binding himſelf and his heirs, and leaving aſſets, the heir taking the profit, becomes ſo a debtor, that his executor ſhall be charged.

In the regiſter there is a writ againſt the executors of the guardian of the ſpiritualties of the archbiſhop of *York*, for the debt of *B.* who died inteſtate, and whoſe goods came to the hands of the ſaid guardian, *viz.* the dean of *York*.

Of Covenants charging Executors.

Where covenants are expreſsly for payment of money, ſhewing them to be bonds in law, that is writings obligatory, whereupon an action of debt may be brought, as well as an action of covenant tho' the words of the deed, bear the ſound and phraſe of a covenant.

In ſome caſes, no action of debt lies upon a covenant to pay money: as if *A.* covenant, that his executor ſhall, within a year or ſuch a time after his death, pay 10 *l.* to *B.* now for that no action or debt was maintainable againſt *A.* himſelf, it lies not againſt his executor, but only an action of covenant.

If the covenant be conditional, as thus, that if *C.* do not pay to *B.* 10 *l.* then *A.* will pay it, and ſo alſo perhaps, if the covenant be in the diſtinctive, *viz.* to do ſuch an act or to pay 10 *l.* now if the act be not done, yet no action of debt lies for the money, but only an action of covenant.

Now let us come to the caſes of mere covenants, and ſee which of them will charge an executor.

If leſſee for years covenants to repair the buildings, or to pay the quit-rents iſſuing out of the land let, there is little doubt, but the executor, to whom the term comes, muſt, as well as his teſtator, perform that covenant, although he did not covenant for him and his executors.

Of Wrongs done by Teſtators, and whether Executors be liable to amends.

Although executors do repreſent the perſons of their teſtators, yet if the teſtator commit any treſpaſs upon the goods of another, or upon his perſon, of lands, no action lies for this againſt the executor, for *actio perſonalis moritur cum perſona*; ſo if a ſheriff, gaoler, or keeper of a priſon, ſuffer one in execution for debt or damages to eſcape, though hereby the party, at whoſe ſuit the execution was, be entitled to an action, *viz.* an action upon the caſe, againſt ſuch officer, by the common law, and by ſtatute an action of debt; yet if he ſo ſuffering die, for that ſuch ſufferance was a wrong of the nature of a treſpaſs, no action lies againſt his executor for the ſame. And upon the ſame reaſon, if one carry away his corn and hay, without ſetting out the tenth, although the treble value be recoverable againſt him in an action of debt, yet if he die before ſuch recovery, the action is gone, and lies not againſt his executor, although the teſtator were a leſſee for years, ſo as his eſtate came to his executor.

The like law in other penal ſtatutes, as for arreſting one at the ſuit of *I. S.* without his privity or aſſent; or, for not appearing as a witneſs, being ſerved with a *ſubpæna*, and having charges tendered; yea, if a leſſee for years commit waſte, and die, no action lies againſt the executor for this waſte; for all theſe caſes are within the rule of *actio perſonalis moritur cum perſona.*

If a parſon, vicar, or other ſpiritual or eccleſiaſtical perſon do ſuffer a ruin or decay of the houſes or buildings upon his ſpiritual benefice or promotion, and dies, his executors are liable, by the ſpiritual or eccleſiaſtical law, to the ſucceſſor's ſuit for amends to the repairing of ſuch ſpoil or decay. And becauſe ſome uſed fraudulently to grant away

away their goods, ſo as nothing ſhall be left to their executors, it was enacted *temp. Elizabeth*, that ſuch grantees of goods ſhould be liable to the ſucceſſor's ſuit, for theſe *dilapidations*, as if they were executors.

As for one other caſe of this nature, *viz.* where an executor waſtes the goods of his teſtator, or an adminiſtrator of the goods of his inteſtate, and dies; whether his executor be ſubject to action for this or not? I adjourn the reader to that place where I ſhall treat of ſuch waſting or devaſtation by executors.

Of the Order and Method to be uſed by Executors in Payment of Debts and Legacies, ſo as to eſcape a Devaſtation or charging of their own Goods.

This conſiſts principally in the iſſuing of money, though partly alſo in delivering or aſſenting to the execution of legacies, not being money but other goods or chattels bequeathed.

Money is to be iſſued by executors four different ways:

About the funeral of the teſtator.

The proving his will.

In paying of debts.

In paying and ſatisfying of legacies pecuniary.

As for the firſt, burials are as of neceſſity for two reaſons. Firſt, of charity to the dead, that he may be chriſtianly and ſeemly interred. Secondly, To prevent and avoid anoyance to the living.

The next thing mentioned, to juſtify and occaſion expence, is the proving of the will: but this way a greater diſburſement (except for riding charges, or by reaſon of oppoſition by a caveat put in, or the like) will not ſtand allowable than is preſcribed by the ſtatute made in the time of *Hen* .8. whereby the fees of ordinaries and their ſcribes, regiſters, and officers are limited

As to the third occaſſion of diſburſement, *viz.* payment of debts, we are to ſee in what order they muſt pay them, as well *ut ſint fidi diſpenſatores*, as for their own indemnity, *ne quid res ſua capiat detrimenti.*

There are three ſorts of debts, *viz.*

Debts of or upon record.

Debts

Debts by ſpecialty.

Debts without ſpecialty.

The debts upon record may be again divided into four ſorts, *viz.*

Debts to the King or the crown.

Debts by judgment or recovery in ſome court of record.

Debts by recognizance.

Debts by ſtatute-ſtaple or ſtatute-merchant.

Amongſt theſe, the debts to the crown are to have the firſt place or precedence, ſo as if there be not come to the executor goods of greater value than will ſuffice for the ſatisfaction of theſe, he is not to pay any debt to a ſubject, and if he be ſued for any ſuch, he may plead in bar of this ſuit, that his teſtator died thus much indebted to the King, ſhewing how, *&c.* and that he has not goods ſurmounting the value of that debt.

If the ſubject's purſuit be not ſo by way of action, as that the executor has day in court to plead, but be by way of ſuing execution, as upon ſtatute-merchant or ſtaple, then is the executor put to his *audita querela*, wherein he muſt ſet forth this matter.

This priority of payment of the King's debt before the debt of any ſubject, is to be underſtood only of debts by or upon record due to the King, and not of other debts.

If any doubt how the King ſhould have any debts which ſhall not be of record, ſince by *ſtat.* 33 *Hen.* 8. *cap.* 30. it is enacted, that all obligations and ſpecialties taken to the uſe of the King, ſhall be of the ſame nature as a ſtatute-ſtaple.

To this I anſwer, that there may be ſums of money due to the King upon wood-ſales, or ſales of tin, or other his minerals, for which no ſpecialty is given; ſo alſo of amerciaments in his courts-baron, or courts of his honours, which are not courts of record: the like fines for copyhold eſtates there. So of the money for which ſtrays within the King's manors or liberties are ſold. Alſo, as the law has been taken and ruled in the *Exchequer*, even debts by contract due to any ſubject, are by his outlawry or attainder forfeitable to the crown. Yet neither theſe nor thoſe due to ſuch perſon outlawed or attainted by bond, bill, or for arrearage of rent upon leaſe, is or can be any debt of record, until office thereupon found; for although the outlawry

lawry or attainder be upon record, yet does it not appear by any record before office found, that any ſuch debt was due to the perſon outlawed or attainted.

Thus debts to the crown have no priority of payment before the ſubject's debts, though the King's debts of record are ſo to have; ſo that if a ſubject, to whom the teſtator was indebted by ſpecialty, ſue for this debt, the executor muſt plead, that the teſtator died indebted thus much to the King by record, more than which he left goods to ſatisfy; if the truth of the caſe ſo be, for if there be ſufficient to ſatisfy both, then the ſubject creditor is not to ſtay for his debt till the King's debt be levied.

Next to debts of the crown, are judgments or debts recovered againſt the teſtator, to have priority or precedence in payment, as being of an higher nature, or more dignity than any other, for that ſtatutes and recognizances, though they make debts upon record, yet are they begotten but by voluntary conſent of parties, whereas in every judgment there has been a courſe and work of juſtice againſt the will of the defendant as is preſumed; and this in a court of juſtice, and the records of ſuch judgments are entered in publick rolls, not kept or carried in pockes or boxes as ſtatutes, and until inrolment recognizances are.

Of Recognizances and Statutes.

Next unto debts by judgment, are thoſe by ſtatute or recognizance to be regarded by the executor. And becauſe I find no difference of priority or precedence between theſe two, I therefore rank them together; yet one reaſon of preferment given to judgments before ſtatutes in *H.*'s caſe, *viz.* that the one remains a record upon the roll in the King's court, whereas the other being carried in the pocket of the conuſee is more private. This, I ſay, ſhould give priority alſo to recognizances before ſtatutes, as alſo another reaſon, for that ſtatutes are not properly records, but obligations recorded; yet do I not find that this makes a difference for priority of payment. And indeed the ſtatute is the more expedite remedy, ſince thereupon execution may be taken out without any *ſcire facias*, or other ſuit, which cannot be in the caſe of a recognizance; for there, if a year be paſt after the acknowledgement, no execution can be ſued out againſt the party himſelf acknowledging it, without a *ſcire facias* firſt ſued out againſt him: and if he be dead, then though the year be not paſt, yet muſt a *ſcire facias* be ſued, and thereupon the executor defendant may plead ſome plea, to hold off the execution for a time. But this notwithſtanding, the executor may ſatisfy the recognizance before

the ſtatute, at leaſt if he do it before execution ſued thereupon; for they ſtanding in equal degree, it is at his election to give precedence and preferment to which he will. Neither is it material which of of them were firſt or more ancient; nor between one ſtatute and another doth the time or antiquity give any advantage as touching the goods, though as touching the lands of the conuſor it doth; but as for his goods in the hands of his executor, whoſoever firſt gets hold of them by his execution ſhall have the preferment.

Before ſuing of execution, the executor may give precedence or preferment to whom he will.

Of Debts by Specialty.

We come now to debts due by ſpecialty, *viz.* bond or bill (of which nature the greateſt number of debts are) let us then ſee what courſe the executor muſt or may hold for ſatisfaction of theſe, admitting that the teſtator ſtood not indebted by any record, or that no forfeiture is of any ſuch debt, or that there are goods in the executor's hands above the amount of ſuch debts by record. This I ſay *dato*, then according to the rule *proximus quiſque ſibi*, the executor may firſt ſatisfy himſelf of ſuch debts, as the teſtator by ſpecialty owed him: for ſuch debts are not releaſed by the creditor's taking upon him to be executor to the debtor.

On the other ſide, if the creditor make his debtor executor, this is a releaſe of the debt

Though the common opinion is, that an executor may firſt pay himſelf, yet is it to be underſtood with this caution or condition, *viz.* that the debt to him be of equal height or dignity with the debts to others, according to the rule *inæquali jure melior eſt conditio poſſidentis*, for if his teſtator were indebted to other men by any ſtatute, judgment or recognizance, and to him whom he makes executor only by bond, or other ſpecialty, then may he not firſt pay himſelf, that is, by paying of himſelf leave them unpaid whoſe debts are of an higher nature; but if there is ſufficient for ſatisfaction both to them and himſelf, then it is not material which be firſt paid.

As to debts of other men, the executor has power to give preferment in payment to whom he will; ſo that if the teſtator left but an 100*l.* being indebted to *A.* 100*l.* and to *B.* 100*l.* by ſeveral obligations, the executor has power to pay *B.* his whole debt, and to leave *A.* altogether unpaid, ſo as he has not commenced any ſuit before payment to *B.* Yet herein this difference is to be taken and obſerved by executors, that if the time of payment upon the bond of *B.* were not come at the time of teſtator's death, then may not the executors before

before the money to *B.* become payable pay him and leave *A.* unpaid whoſe money was preſently due. Yet if *A.* forbear to demand or ſue for his debt till the debt of *B.* become alſo payable, then is it at the will of the executor to pay whether of them he will, ſo as the other may loſe his whole debt, if the goods will not ſuffice to pay both.

What if *A.* have only by word demanded his debt and not by ſuit before the debt to *B.* become payable, whether does that hinder that the executor may not now when the money to *B.* is alſo payable, pay him and leave *A.* unpaid?

This *S. Germ.* anſwers negatively, making this verbal demand to be of no effect; and he adds, that if *A.* has commenced ſuit before the debt to *B.* become payable, yet if the executor can delay the ſuit till the debt of *B.* become payable, ſo that *A.* can get no judgment before that time, and before *B.* has commenced ſuit upon his bond, then may the executor confeſs his action, and ſo pay his debt, leaving *A.* unpaid. But of this I make ſome doubt, as by *Ed.* 4. if *A.* having a tally, patent or other warrant from the King for receipt of money, of or from a cuſtomer or receiver where others had like warrants before him, but *A.* makes the firſt demand, now muſt the officer firſt pay him, or elſe himſelf ſhall become debtor to him, if he firſt pay others, whoſe demands were after made, though they had warrants before *A.* It is likewiſe aſſerted, that the very demand made by a creditor of his debt from an executor, who has then aſſets in his hands, does entitle the creditor to recover damages againſt the executor out of his own goods; which if it ſo be, then doth even that verbal demand lay ſome tye or obligation upon the executor for payment.

Of Devaſtation or Waſting.

1. *What ſhall be ſaid to be a waſting or devaſting, and how many ways that may be done.*

2. *Who ſhall by this act be charged to yield recompence.*

3. *Who ſhall take the benefit or advantage of it.*

4. *How far or in what meaſure the advantage ſhall be taken.*

5. *What way or by what means it ſhall be had.*

As to the firſt, this waſting is done divers ways:

By the executor's plain, palpable and direct giving, ſelling, ſpending or conſuming the teſtator's goods after his own will leaving debts unpaid.

By paying what is not to be paid, which yet is to be underſtood where there are debts payable and unpaid,

By the not obſerving the right method and order of payment.

By aſſenting to a legatee's having a thing bequeathed, debts being unpaid.

By ſelling goods of the teſtator's at an under value; for be the appraiſement what it will, and let him ſell for what he will, he muſt ſtand charged to the beſt and utmoſt value towards the creditors,

If upon a judgment againſt the teſtator or the executor, the ſheriff ſell ſome of the teſtator's goods at an under value, this is no devaſtation of the executor. But ſince an executor may happily prevent this act of the ſheriff by paying the due ſum upon ſale of the teſtator's goods at the beſt value or otherwiſe, he is to be blamed to leave it to the ſheriff or under-ſheriff.

Laſtly, this may be done by illegally diſcharging of any debt or duty pertaining to the teſtator.

As if an executor upon a bond of 200 *l.* forfeited for payment of 100 *l.* accept the principal, or perhaps alſo ſome uſe, coſts or damage, and give a releaſe or acquittal of the whole forfeited bond, or of all actions, or upon record acknowledge ſatisfaction upon judgment had. This is a waſting of ſo much as the penal ſum is more than is received, and ſo far his own goods ſtand liable to creditors not ſatisfied; and ſo is it if he do but give up the bond, having no judgment upon it, though he neither make releaſe nor acknowledge ſatisfaction. But his verbal agreement to require or ſue for no more, or his giving a note of receipt for ſo much as he hath received, or delivering of the bond into a friend's hands, or into a court of equity, in way of ſecurity to the debtor that he ſhall not be ſued for more, is no devaſtation, ſince ſtill the reſt in law remains due and ſuable,

If one take away goods from the teſtator or from his executor, if the executor make him a releaſe, this is a devaſtation, and makes his own goods liable to the whole value of the goods releaſed,

Another way of diſcharging, dangerous to executors, is ſubmitting matters of debt or duty, or touching goods taken away to arbitrament. For if by the award of the arbitrators the debtors or wrong doers be diſcharged or acquitted without making full recompence, the reſt of the value will as to other creditors ſit upon the executors, becauſe it was their voluntary act thus to ſubmit it to arbitrators.

As to the ſecond, we ſhall have in conſideration two ſorts of perſons, firſt his executors, there being many times divers executors, and the waſte

waſte or devaſtation done but by one. Next his own heirs, executors and adminiſtrators, *viz.* whether, he dying, this act ſhall fix upon them like charge and burthen, for ſatisfaction, as upon himſelf ſhould have lain in caſe he had lived.

Touching his companions though all together make but one executor, yet the miſdoing of one ſhall not charge the reſt, nor make their goods liable to recompence.

As for executors or adminiſtrators, the waſting executor dying before he has borne the burden of his miſdoing, I have found contrary opinions, firſt in the *Exchequer* it was conceived to be as a treſpaſs dying with the perſon, as coming within the rule, *actio perſonalis moritur cum perſona.*

In the caſe of *Walter* and *Sutton*, the court of *Common Pleas* was of contrary opinion; *viz.* that this was not eſcaped by the death of this miſdoer, but the law would purſue his executors or adminiſtrators, and lay upon their backs the burden of recompence or ſatisfaction; for that the teſtator or inteſtate doing this wrong had made himſelf to be debtor in the firſt teſtator's ſtead, and therefore they who repreſent his perſon muſt with his goods make amends.

Touching the third point, *viz.* to whom the advantage of waſting ſhall accrue, or who by reaſon thereof ſhall charge this waſting executor.

We will put the caſe that the teſtator ſtood indebted to *A.* by ſtatute, and to *B. C.* and *D.* by ſpecialty, not of record, as bond, bill, *&c.* and the executor having no more in aſſets than only that 100*l.* and this all being due to *D.* he pays him the whole 100*l.* not having any thing left to ſatisfy any of the reſt of the creditors: hereby wrong is done to none but *A.* who was a creditor by ſtatute, and therefore he only ſhall make this executor to pay the like ſum out of his own goods, ſince as to him only this is a devaſtation, or that it was his election to pay off the other creditors; which he might have done, no ſuit being commenced by any of them, conſequently no wrong was done to *B.* nor *C.* And if no ſuch debt had been by ſtatute, but all had been creditors by ſpecialty, and *A.* only had commenced ſuit, and that known to the executor, now if after he pays all to *D.* he ſtands only as to *A.* liable in his own goods, and not to *B.* nor *C.*

If the executor had only paid a legacy or debt by contract, leaving nothing for ſatisfaction of the debts by ſpecialty, then had he ſtood equally liable to each of the other creditors.

As to the fourth point, *viz.* how far the executor thus waſting ſhall incur damage or make his own goods liable: doubtleſs no farther than the value of the teſtator's goods waſted or miſadminiſtred. Therefore if one have advantage thereof to the full ſum, no other after ſhall, for he is no further a treſpaſſer or wrong doer, nor is the teſtator's eſtate any further or more deeply damnified.

As damages for treſpaſs are to be proportioned to the value of the wrong done, and loſs ſuſtained: ſo alſo in this caſe the executor, by his miſdoing, doth not draw upon himſelf his teſtator's whole debts, but ſo much only as the goods amounted to, which he did miſadminiſter, and which ſhould have gone to the payment of the teſtator's debt, if he had not ſo miſguided himſelf in the office of executorſhip, which default he muſt repair or make good.

As to the fifth point, *viz.* how and in what manner relief ſhall be had upon this point of waſting, for him to whom it pertains; firſt, this is to be obſerved, that in caſe where the verdict paſſes directly againſt the plaintiff, no devaſtation can come in queſtion, for that no judgment being for the plaintiff, no writ of execution can iſſue, and therefore, if upon the iſſue of fully adminiſtred, it ſhall appear that there hath been a devaſtation which cauſes aſſets to fail, then muſt the jury find that the defendant hath aſſets, and not find a devaſtation.

Of an Executor's own Wrong.

He is ſuch as takes upon him the office of an executor by intruſion, not being ſo conſtituted by the teſtator or deceaſed; nor for want of ſuch conſtitution ſubſtituted by the ordinary to adminiſter. We will conſider ſuch perſons under the following heads, *viz.*

What acts or intermeddlings of ſuch an one not being executor nor adminiſtrator by right, ſhall make him to become an executor by wrong.

In what manner, and by what name ſuch ſhall be ſued, eſpecially when another is executor or adminiſtrator, or himſelf after ſuch act becomes adminiſtrator.

What acts done by him ſhall ſtand firm, as if he had been an executor by right.

How far he becomes liable to creditors, and how and to whom.

As to the firſt, it was in the reign of *Mary* doubted, and not reſolved, whether the only ſeizing, and taking into one's hands, the goods

goods of the deceaſed did make one executor of his own wrong without any further act. In the reign of *Eliz.* Lord *Dyer* ſaid that the poſſeſſion and occupation of or meddling with the goods is that which gives notice to creditors, whom they are to ſue as executor.

Creditors ought to be careful before they commence ſuit, otherwiſe they cannot know whether he ſo intermeddling be executor or adminiſtrator, nor conſequently how to found their ſuit rightly and ſafely for good ſucceſs, ſince a ſuit againſt an executor as adminiſtrator, or *vice verſa*, will prove ruinous and fall to the ground.

For example: Where an adminiſtrator, ſued as executor, did not plead that adminiſtration was committed unto him, but generally denied that he was executor or adminiſtred as executor, the Lord *Dyer* held that it muſt be found for him, yet left it doubtful: but the clear and ſafe way had been to have pleaded the adminiſtration, *&c.*

In the former caſe *Dyer* ſaid, that one intermeddling only about the funeral, and laying out money therefore; an overſeer or conductor, or he who hath letters of the ordinary *ad colligend.* viz. to get and keep the goods in ſafety, and one who intermeddles by virtue of a will truly made, but controuled by a latter will after found and proved, may free himſelf from being an executor of his own wrong, by ſpecial pleading how or in what right he intermeddled, and traverſing his adminiſtring in other manner; and that this traverſe need not be, was held in the reign of *H.* 6. and 7. for that ſuch acts amount not to any adminiſtring at all.

How and by what Name Suit ſhall be againſt ſuch, and the like.

In general, this uſurping executor is not in ſuit to be diſtinguiſhed by name from the right executor, but to be ſued generally by the name of executor of the laſt will and teſtament of the defunct, and then, if he will deny himſelf ſo to be, he muſt plead that he neither is executor, nor has adminiſtred as executor: then the plaintiff muſt prove that he has adminiſtred in ſome ſuch or the like ſort as aforeſaid.

It has been divers times held, that where there is a right executor, and yet another doth adminiſter by wrong, it is at the election of creditors either to ſue them jointly together, or one or both of them ſeverally and by himſelf.

Where adminiſtration is committed, another alſo adminiſters by wrong, theſe cannot be ſued together as adminiſtrators; for though one may be an executor by uſurpation or wrong, yet none can come to be an adminiſtrator by wrong, ſince no other but ſuch as receives that power from the ordinary can ſo be; therefore in that caſe there

is

is a neceſſity of ſuing him by himſelf (who ſo uſurps the adminiſtration) by the name of an executor.

If *A.* adminiſter the goods of *B.* not being executor nor adminiſtrator, and after his ſuch doing and diſpoſing of the goods he obtaineth adminiſtration of the goods of *B.* but the goods left or coming to his hands ſince the adminiſtration committed, ſuffice not without the other debts received or releaſed, or goods ſold before, to ſatisfy creditors. Now if any ſue *A.* by the name of adminiſtrator, he ſhall have no further relief than according to the value or extent of the goods left in or come into his hands ſince the adminiſtration committed, and if thoſe be fully adminiſtred, he ſhall get nothing. If they remain unadminiſtred, but amount not fully to his debt, he muſt want ſo much of ſatisfaction. If he will be relieved or ſatisfied out of the goods before diſpoſed of, he muſt ſue *A.* as executor of *B.*

As to how far this executor of his own wrong becomes liable to ſuit, firſt it appears he becomes ſubject both to the action of the executor who hath right to the goods wrongfully intermeddled withal by him, though it were before proving of the will, and alſo to the action of the creditor who hath right to the ſatisfaction of his debt.

Secondly, as touching the meaſure how far he is engaged, doubtleſs he is not by his wrongful adminiſtring become chargeable with the whole account of the teſtator's debts, but only ſo far, and with ſo much thereof, as the goods which he ſo wrongfully adminiſtred amount unto, (yet he muſt look to his plea, elſe by it he may draw all ſued for upon himſelf, as if he deny his being executor or adminiſtrator.

As to the fourth, *viz.* what acts done to him or by who is an executor of his own wrong, ſhall ſtand firm and good, as done by or to the right executor.

Suppoſe firſt, that the deceaſed were indebted to him 20 *l.* who thus uſurpeth executorſhip, whether may he pay himſelf or not? This point was in debate in the *King's Bench* between *C.* and *I.* executor of *H.* where it was ſtrongly objected, that notwithſtanding the rightful executor or adminiſtrator might puniſh him, and recover againſt him for the goods which he adminiſters, yet another creditor ſuing him as executor generally, and ſo affirming him to be (for there is no ſpecial form of writ or declaration to diſtinguiſh an executor by wrong from a rightful executor) he ſtands as againſt him in the ſtate of a rightful executor, and therefore may firſt pay himſelf before he pay others; and of that mind at the firſt were *Fenner* and *Gawdy*, Juſtices, yet did they admit that this payment ſhould not ſtand good, as againſt the rightful executor or adminiſtrator.

Popham and *Clinche* held, that neither ſhould it ſtand good againſt other creditors, for then every man would ruſh upon the teſtator's goods, and be his own carver in payment: and whereas it was ſaid at the bar, that the Lord *Anderſon* upon an evidence at *Guild-hall*, had ruled it otherwiſe, *Popham*, at another day of debate of the ſaid caſe, related that the Lord *Anderſon* did deny that he ever ſo ruled, or was of that opinion. In the debate of this caſe, queſtion was made, if ſuch an executor by wrong pay a debt to another creditor by ſpecialty, whether this ſhall not ſtand firm and good; and it was agreed by the better opinion at leaſt that this ſhould ſtand firm and good, ſo as if the payment were out of his own goods, he might retain to himſelf in lieu thereof ſo much of the goods of the teſtator; for here he doth not, as in the other caſe, advantage himſelf by his own wrong. Yet that opinion allowing this payment to creditors, muſt be underſtood with this difference, *viz.* that this payment ſhall ſtand as againſt other creditors, but not as againſt the right executor or adminiſtrator, for then any ſtanger might uſurp the office of executor, and take from him that liberty and election to prefer which creditor he will in firſt payment; yea, might take from the executor power to pay himſelf before other in caſe there were a debt due to him, which were very unreaſonable.

Of Addition and Alteration by the Statute 43 Eliz. Cap. 8.

By the above ſtatute it is enacted, That every perſon receiving or having any goods or debts of any inteſtate, or any releaſe or diſcharge of any debt or duty belonging to him upon any fraud as aforeſaid, or without conſideration of or near the value (except in ſatisfaction of ſome juſt and principal debt, to the value of the goods or debts due from the inteſtate) ſhall be charged as executor of his own wrong ſo far as the value of thoſe goods and debts amount; deducting all principal juſt debt to him due, and payments by him made, which a lawful executor ought to have paid.

Of Pleas by Executors, which are beſt, and which moſt prejudicial to them.

If an executor do utterly eſtrange himſelf from the executorſhip; ſaying that he was never executor nor ever adminiſtred as executor (for that muſt be added) then if iſſue be taken upon this plea, and it be found againſt him; the plaintiff ſhall have judgment to recover not damages only, but even the debt it ſelf out of the proper goods of the executor, if none of the teſtator's can be found to ſatisfy it. And this ſhall be thus not only where it is found that the defendant was made executor by the will, and proved it, and ſo could not chuſe

but

but know it, but even alſo where he had never proved the will whereof he was made executor, nor ever adminiſtred by virtue thereof.

Suppoſe he never was once named, made or intended to be made executor, yet having pleaded this plea, that he never was executor nor adminiſtred as executor, if it ſhall be found by verdict that he did adminiſter or intermeddle as executor, the ſame blow or burden falls upon him.

A feme ſole being executrix, makes a deed of gift of the teſtator's goods in truſt, but continues poſſeſſion of them and marries *I. S.* who alſo has poſſeſſion of the goods, and in an action of debt by a creditor fully adminiſtred is pleaded: now upon evidence the verdict ſhall paſs for the plaintiff; for this alienation being fraudulent was void as to all creditors, and ſo as to the plaintiff the goods continued the teſtator's, and ſo aſſets in the defendant's hands, as was held in the *King's Bench.*

If fully adminiſtred be pleaded, where the defendant has aſſets for part, but not ſufficient for all, and ſo it is found, yet ſhall not judgment be given for the whole, but for part preſently with a further award, that when more ſhall come to the executor's hands, the plaintiff ſhall then have further judgment for the reſt, ſo as that falſe plea does him no prejudice, but makes him in as good ſtate, the charges of trial excepted, as if he had confeſſed himſelf to have part.

Sir *Ed. Cooke* at the bar, *Trin.* term, 36 *Eliz.* ſaid, that where fully adminiſtred is pleaded, the plaintiff is not tied to maintain the contrary, but may preſently pray and have judgment to recover it when aſſets ſhall futurely come to the defendant's hands, which was denied by ſome.

Where Judgment ſhall be againſt the Executor's own Goods, though no Plea of the Defendant nor Devaſtation do ſo occaſion, and of the ſeveral Manners of Judgment in ſeveral Caſes.

Where an executor is ſued for rent behind after his teſtator's death, upon a leaſe for years, made to the teſtator, and by him left to his executor. Here it ſhall be adjudged and levied upon his own goods, for that ſo much of the profits as the rent amounted to ſhall be accounted as his own goods, and not his teſtator's, therefore is he to be ſued as well in the *debet* as in the *detinet*, where in other caſes he is not, but in the *detinet* only being ſued as executor. So if any thing delivered to or detained by his teſtator come to his hands, and he

he ſtill detains the ſame after the demand, and be thereupon ſued in an action of detinue, for this is his own act, nor in this caſe need he to be named as executor, for he ſhall not anſwer damages for his teſtator's detaining. So if he aſſume to pay a debt of his teſtator's, having aſſets, and be ſued upon this *aſſump.* the which debt is to be recovered in damages, and that upon or out of the executor's own goods, yet is this action and the aſſumption, which is the ground thereof, founded in the executorſhip, and his having aſſets, for if either he had not been executor, or if he had not aſſets at the time of the promiſe, it had been *nudum pactum*, and would not have bound him, nor given good cauſe of ſuit.

Another caſe there is wherein the judgment muſt be, as it ſeems, againſt the executor's own goods, *viz.* in an action of covenant for a breach of covenant ſince the teſtator's death.

Sometimes where the executor himſelf is ſo to bear the burden, judgment has been entred, that the ſum recovered ſhall be levied of the lands and goods of the executor.

Of Women Covert Executors.

Firſt, whether they may make wills and executors, with or without their huſband's aſſent, and how, where, and in what caſes.

Secondly, whether they may be made executors without their huſband's aſſent, or how their huſbands may hinder it.

Thirdly, what acts in execution of the executorſhip they may do without their huſbands, or their huſbands without them.

A woman married, *or feme covert*, is *ſub poteſtate viri, cui in vita contraditere non poteſt*; therefore it is that judges, when a woman is to acknowledge a fine of any land, do examine her apart from her huſband, to know whether ſhe be willing, or come to do it by the compulſion of her huſband: it is therefore hard for her to have freedom of will, and conſequently freedom to make a will. Beſides, all her moveables or goods perſonal, which ſhe had at the time of her marriage, otherwiſe than as executrix or adminiſtratrix, are by the law totally diveſted out of her, and ſettled in the huſband as fully *ipſo facto* upon the very marriage, as any other that were his own before: of theſe therefore ſhe can make no diſpoſition, no more than of other her huſband's goods.

In caſe ſhe do by will bequeath them, although the will and gift be void, yet if the huſband, do, after his wife's death, conſent to this

her will and gift, by delivering of the goods bequeathed after her death, or aſſenting that the legatee take them by virtue of ſuch will and gift; this amounts to a new gift by the huſband.

If a woman have a leaſe, an eſtate by extent, a wardſhip, the next avoidance of a church, or other chattel real; theſe are not diveſted out of her into her huſband by marriage, but in caſe ſhe overlive him, they continue to her as before, no alienation or alteration having been made by the huſband, who had power to diſpoſe of them by gift in his life-time, though not by his will; yet ſuch a woman in her huſband's life-time could not of or for theſe things, without her huſband's aſſent, make an executor or will, but ſhe dying before him, they would, by the operation of law, accrue to him.

Suppoſe that a woman indebted 1000*l.* and having leaſes and moveable goods to the value of 3000*l.* or 4000*l.* marries *I. S.* and then dies before the debt be recovered againſt her: in this caſe the huſband ſhall have and go away with all this value of his wife, and is not in law liable to pay one penny of her debts, becauſe he is neither her executor nor adminiſtrator.

Another ſort or kind of goods, or rather intereſts, a woman may have, *viz.* debts or things in action, which as the former, are not deveſted out of her by marriage into her huſband, nor yet can ſhe thereof make an executor without her huſband's aſſent, although they be one degree farther from the huſband than the ſaid chattels real, for that though the huſband do overlive the wife, he ſhall not be intitled to them as the former: but if his wife make him executor, as ſhe may, or if after her death he take adminiſtration of her goods, then as he is thereby intitled to them, ſo is he liable alſo to pay her debts out of the ſame, when he ſhall have received them.

Wives or women covert being made executors, and ſo having the office of executorſhip put upon them againſt their huſband's will, there has been diverſity of opinions. In the reign of *Ed.* 1. *Brab.* Juſtice, ſaid, ſhe may be executrix without her huſband, and the adminiſtration ſhall be delivered to her only.

In courts ſpiritual, no difference is made between women married and unmarried: there a wife ſues and is ſued alone without her huſband; he intermeddleth not, nor is intermeddled withal, touching the things pertaining to his wife.

At the common law it is otherwiſe, and there, as *Bryan* Chief Juſtice ſaid, a wife without the aſſent of her huſband cannot be executrix, *viz.* that the huſband may oppoſe and hinder it: for ſuch a one may be named executrix in and by a will without the knowledge of her

her husband: let us then see how, after the death of the testator, the husband can hinder her proving of the will or intermeddling to administer, since it may be a matter both of much trouble and danger to him, to have the executorship fasten upon his wife, and consequently upon himself.

On the other side, it may be a benefit and advantage to the husband, and therefore we will also consider, whether the husband may (though the wife should refuse) assume the executorship and fasten it upon her. The testator therefore being dead, and fame or common report carrying it to the ordinary, that the wife of *I. S.* is made executrix, if she come not in gratis or voluntarily to prove the will, process or citation is to be sent out of the spiritual court against her, to enforce her coming in to take on her the executorship. She coming, may clearly, as well as any other person (especially if her husband concur with her therein) refuse this office, trust and charge, so as, if there be no other executor named, the ordinary may commit the administration: if she should not come and appear, she shall be excommunicated, notwithstanding any allegation or intimation by her husband of his unwillingness to have her take upon her the executorship. But suppose she do come into court and offer herself ready to take the executorship upon her, and on the other side, her husband expresses his dissent thereunto, praying that she may not have the execution of the will to her committed, what shall then be done? In the courts spiritual, a wife stands in the same plight and state as a woman sole, the husband not intermeddled withal in the affairs of the wife; therefore do I conceive that, in that court, the husband's refusal will not be of force to hinder the committing of the executorship to the wife not refusing it, at least if there come not a prohibition to stay the spiritual court's proceeding.

This stands clear in the rules of the law of *England*, that the wife is under the husband's power, and cannot contradict him in pleading and doing other acts even touching her own freehold: nay, she cannot take lands nor goods by gift or conveyance, without her husband's assent.

If once the will be proved, and the execution thereof committed to the wife, though against her husband's mind and consent, it will stand good.

Touching the Administration or Execution of the Office of Executor by a Feme Covert and her Husband.

We will now come to admit the execution of the will assumed by concurrent consent of husband and wife, and the will proved

with both their liking in the wife's name, and examine what acts the wife of herſelf is able to do, and what her huſband without her.

It was anciently held, that if a *feme covert* or married woman executrix releaſe a debt of her teſtator, or give away the goods which ſhe has as executrix, or deliver a legacy bequeathed, it was firm and good, and on the other ſide, that her huſband's gift or releaſe was of no value, for that the adminiſtration or execution of the will is committed to the wife only, (in the courts of common law, I mean, for in the ſpiritual court it is true the huſband is not joined with the wife in ſuit) but the law is doubtleſs in all thoſe points contrary, for otherwiſe, if the wife's gift or releaſe ſhould ſtand good, her act might exceedingly endamage her huſband, and make his goods liable to the creditors, the teſtator's eſtate being waſted by the gifts or releaſes of his wife; wherefore it was held, that unleſs due payment were made to ſuch women covert executors, their releaſes or acquittances be void, and ſo alſo their gifts and grants: and it was held, that the huſband of the wife executrix may give goods or make releaſes of of debts at his pleaſure.

But doubtleſs by marriage neither are the goods though perſonal, which the wife has as executor, deveſted out of her and ſettled in her huſband as her own goods are; nor, if ſhe die, ſhall they accrue to the huſband, if no alteration were of the property, but ſhall go to her executor or, to the next of kin, being adminiſtrator of her teſtator if ſhe have no executor; yea though for any other goods which the wife had in her own right before marrying, the huſband alone without naming the wife may maintain an action of treſpaſs; yet touching ſuch goods as the wife has as executor, the action muſt be brought in the names of the huſband and wife, to the end that the damages thereby recovered may accrue to her as executor in lieu of the goods. So alſo muſt the replevin for thoſe goods be in both their names.

But although the huſband be thus named with the wife, yet principally it is the ſuit of the wife, therefore in ſuch actions or in debt by huſband and wife, ſhe being executor, if it come to trial by jury, the huſband being an alien, yet ſhall he not have trial *per medietatem linguæ* or *alienigenarum*, that is, by half aliens, as in other caſes: caſes where an alien is party to a ſuit is to be had. And where, to a wife made executor, power is given to ſell land of the teſtator's, ſhe may ſell to her own huſband, as was reſolved in the time of King *Henry* the ſeventh, where the feoffees (it being land ſettled in uſe) were committed to the *Fleet*, for that they would not execute an eſtate to the huſband, according to the wife's eſtate.

Quære: Since the law intends the wife ſo under the huſband's command and ſubjection, that it holds not her diſpoſition of land to him

him by will free, nor therefore of force, and how ſhall this then be conceived to be but a partial ſale? Yet *volente non ſit injuria*, and he that will put ſuch power into the hands of a woman under coverture, doth in a manner ſubject it voluntarily to the huſband's will. And it has been held by ſome, that even an infant's or feme covert's conveyance in ſuch caſe of neceſſity ſhould ſtand firm and unavoidable, becauſe of the condition expreſs or implied, that the eſtate ſhould be void, if no ſuch conveyance be made.

Touching Infants, and their making or being made Executors.

We ſhall now conſider of diſability by age, for want of years in perſons making or being made executors.

Let us firſt take a view of the ſeveral ages of men and women to ſeveral purpoſes material in the law's judgment and reſpect. And firſt, touching a woman:

Wangford, in *Henry* the ſixth's time, ſhews, that ſhe has ſix ſeveral ages, reſpected in and by the law.

As firſt, the age of ſeven years, for her father to have aid of his tenants to marry her.

Next nine years to deſerve dower, that is, that in caſe ſhe be of that age at the time of her huſband's death, ſhe ſhall be endowed, but not if ſhe be any thing under thoſe years; the law being phyſically informed, that a woman at thoſe years may conceive a child, but not under them.

By ſtat. 18 *Eliz. c.* 7. it was made felony to have unlawful carnal knowledge of any woman child under the age of ten years, it being then conceived that no ſuch child could conſent.

The age of twelve years is a woman's time for aſſenting or diſaſſenting to marriage in more tender years had.

The age of fourteen years is a woman's time to be in wardſhip or not, ſo as if ſhe be any thing above thoſe years at the time of her anceſtor's death, ſhe eſcapes wardſhip.

The age of ſixteen years is her time of coming out of wardſhip, being once fallen under it, for although, had ſhe been full fourteen, ſhe had eſcaped it; yet not ſo being at the time of her anceſtor's death, her wardſhip laſteth till ſixteen years.

And laſtly, the full age of a woman whereby ſhe is enabled firmly and unavoidably to make grants or conveyances is 21 years, as well as for the male, before which time, be it that ſhe being ſole make a feoffment or other conveyance, or being married alien her land by fine, and her huſband of full age join with her, yet is it infirm and avoidable.

As to the male, or man, the firſt age material and ſettledly reſolved on, is 12 years, for at that time each male is at the leet to ſwear his fidelity to the King; this women do not, and therefore are they never ſaid to be outlawed, but to be waived, becauſe they have not this admittance into the law which males have.

The ſecond age of males is 14 years, accounted by the law the age of diſcretion, eſpecially material to two purpoſes, *viz.* firſt, that if one under that age commit an act amounting to felony, yet is he to ſtand free from the attainder and puniſhment incident to a felon: regularly it is thus, one of much leſs years, having attained ripeneſs of diſcretion and diſcerning, ſhall incur the like attainder as one of full age, as was reſolved 3 *H.* 7. touching an infant but of the age nine years, who having killed another boy of like age with his knife, and then hiding the ſlain boy, and excuſing the blood found upon him, by ſaying that his noſe had bled: It was held by the judges, that he was to be hanged as a felon, his ſuch non-age notwithſtanding.

The other point, touching which, the age of 14 years is eſpecially material, is as to an heir of lands held by ſocage; for in caſe ſuch heir be under that age, he is to be in ward to the next kin, but if he be of that age, he is not to be in ward at all, for that the law judgeth him to be of diſcretion at thoſe years, and therefore a guardian in ſocage being in effect but a bailiff accountable, he has no need of ſuch an one, other than ſuch as himſelf ſhall chuſe.

The third age in and touching males material is fifteen years; for every lord of a manor, or one having freeholders in ſocage, or by knight's ſervice, when his eldeſt ſon comes to that age, *viz.* fifteen years, is to have of them aid for the making of him a knight, towards which every one holding by a whole knight's fee is to pay 20 *s.* and ſo ratably for more or leſs: and each holding 20 *l.* land in ſocage, is to pay the like ſum, and ſo ratably for more or leſs.

The fourth age of males, is the full age of 21 years, which makes him free from wardſhip, having lands held by knight's ſervice deſcended unto him: and alſo makes him able to alien lands or goods, makes firm his bond, ſtatutes, recognizances, *&c.*

The

The laſt age of males reſpected by the law, is 70 years, at which time ſheriffs are to forbear to impanel them, in juries, and in caſe they do not, ſuch old man may have a writ to the ſheriff, grounded upon the ſtatute for that purpoſe, made in the time of King *Edward* the firſt, commanding ſuch ſheriff to forbear the impanelling of him; and he may have an action to recover damages upon that ſtatute: this is commonly called a writ of *dotage*, a word, perhaps, anciently taken in a good and favourable ſenſe, *pro dote etatis*, viz. a gift, privilege, or exemption allowed to age in favour thereof, and as a benefit.

Having thus taken a view of theſe ſeveral ages, let us now ſee, wherein and how age is material, touching them who are to make or to be made executors, and what age required thereabout. *Perkins* ſays, that one of four years old may make a will, and conſequently executors; and his reaſon is, becauſe, the executors being to account before the ordinary, it cannot be intended but that the goods ſhall be diſtributed juſtly. Admitting it were ſo, and no bequeſt at all contained in the will, yet ſince at that age an infant has no diſcretion to elect a fit perſon to diſtribute his goods, money, and other things; no nor to make continuation of an executorſhip to another, to whom perhaps the infant was executor; I cannot think that this will ſhould be of any force: but if he be of the age of 14 years, being the age of diſcretion, in the judgment of law, then I ſhould hold him able to make a will, although he be an infant till 21 years, and can make no gift of land nor goods which ſhall be of force.

As to an infant made executor, how young ſoever he be, the making of him ſo is not void, but yet the execution of the will, which is the performance of the office of executor, ſhall not be committed to him till he come to the age of 17 years by the law ſpiritual, and, till then, adminiſtration is to be committed to ſome other; yet if it be a woman infant who is ſo made executrix, in caſe ſhe be married to a man of 17 years old or more, now is it as if ſhe were of that age, and her huſband ſhall have the execution of the will, and if adminiſtration were before committed during the minority of the woman, it ſhall now ceaſe.

Further touching infants executors, and under the age of 17 years, this is to be noted, *viz.* that ſuch an one is not able as an executor to aſſent to a legacy, ſo as it may by virtue thereof ſettle in the legatee. Alſo if adminiſtration be during ſuch minority committed with ſpecial words of reſtraint or limitation, *viz.* that it is done to the uſe or profit of the infant executor, then no ſale of leaſe, or goods, or aſſent to legacy, by ſuch adminiſtrator, will bind or prejudice the infant executor; but otherwiſe, perhaps, if the adminiſtration during the minority be committed generally.

If the teſtator himſelf, making an infant executor, do alſo appoint another to be his executor during his non-age, expreſſing it to be only for the benefit and behoof of the infant executor, I doubt whether this temporary executor ſtands reſtrained from what pertains to the power of an abſolute executor, for there may be perhaps difference between him to whom the owner of the goods commits the government of them, though but for a time, and in ſpecial manner, and an adminiſtrator ſo ſpecially made by the ordinary, another being preſently by the will of the owner or teſtator to have the adminiſtration, in whom for a time legal defect is found.

Let us paſs over this age of 17, and conſider of the infant between the time of his being admitted to take upon him the executorſhip, and his accompliſhment of his full age of 21.

Firſt then, ſuppoſe that he do releaſe a debt due to his teſtator, whether ſhall this be good to bind him, and to diſcharge the debtor as well as if the executor had been of full age, he now having proved the will, and being by the law ſpiritual approved an able executor. And this point coming in queſtion in *Ruſſell*'s caſe, 26 *Eliz.* conſideration was had both of divers good reaſons for enabling of this releaſe, as that an executor repreſents the perſon of his teſtator, and in his right and power doth theſe acts, and not in his own, and therefore his infancy, which is a ſtate or condition of his own natural perſon, ſhall no more diſable him than it doth the King, a mayor, or other head of a corporation.

Upon great deliberation in the *King's Bench*, and upon conference had with *Anderſon*, *Manwood*, and other juſtices, it was reſolved, and adjudged, that the releaſe of an infant executor, without payment of the debt or duty would not bind or bar him.

Firſt, for that if it ſhould, it would be a waſting or devaſting of the goods of his teſtator, and ſo would charge his own goods.

Secondly, it would be a wrong which an infant could not do by his releaſe.

Thirdly, it was no purſuit nor performance of the office or duty of an executor, but the contrary.

Upon this judgment a writ of *error* was brought in the *Exchequer-chamber*, where it was agreed by all, that the releaſe was not effectual nor binding, ſo as this point now had the reſolution of all the judges of *England*.

But it was agreed, that if payment or ſatisfaction had been made, then the infant executor might have made a good acquittance, and

diſcharge

diſcharge, and indeed payment itſelf, if proved, brings diſcharge enough, except in the caſe of a ſingle bill.

Note; that the principal caſe adjudged was not of a releaſe of any debt or duty by ſpecialty, but of treſpaſs in converſion of goods found or taken in the teſtator's life-time.

But *poſito*, that this infant had aſſented to a legacy, whether will this bind him or not? For in the ſaid caſe of *Ruſſel*, it is ſaid, that all things which an infant doth, according to the office and duty of an executor, will ſtand firm; now it is part of his office to pay and execute legacies. Yet ſince this act amounts to a devaſtation or waſting of the teſtator's goods, as well as the other, in caſe there remain not goods ſufficient for payment of the debts, and conſequently here, as well as in the other caſe, the infant's own goods would become liable to his teſtator's debts; I doubt, that it is not, nor can ſtand effectual, for except in the other we admit a want or poſſibility of want of aſſets or goods, the releaſe could neither hurt the infant himſelf, nor do wrong to any other, and that admitted, this caſe is of like prejudice; yet if this aſſet ſhould be void, ſo alſo would be his payment of legacies, and how then were he an able executor at the age of 17 years to ſue and to be ſued for debts and legacies, and if upon ſuit it cannot be ſhewed that debts will take up all, or diſable the payment, then happily he may be forced to pay.

Quære, Notwithſtanding whether theſe acts, though voluntary, ſtand not good upon *bene eſſe* or conditionally, *viz.* if there be beſides goods ſufficient, *&c.* or that elſe the nonaged executor may have an action of account for the money by him paid to the legatee, and alſo avoid his aſſent where that only needful. But doubtleſs, neither the aſſent of ſuch executor before his age of 17, nor any payment of a debt to him could be good, although ſuch acts to or by another executor, before the proving of the will, would ſtand firm and good: for this infant wants not only proving, but alſo ability to prove his teſtator's will, yea, the will ſtands ſuſpended, and the teſtator as it were inteſtate, whilſt the adminiſtration ſtands in force, ſo as during that time nothing can be done by any as executor, and therefore there is great difference between the caſes.

What if payment of a legacy be made to an infant, can he make a ſufficient acquittance; this I confeſs is beſides the point in hand, yet becauſe it concerns infants, and executors (though not infant executors) we will examine it a little for the benefit of both executors and legatees.

Firſt, therefore in caſe the executor be of years of diſcretion, *viz.* 14. I hold it clear, that any payment to him made will ſtand good, for that the law at that age holds him able to govern, and manage

his own lands held in ſocage, and conſequently to receive the rents thereof; wherefore, whether he who makes ſuch payment have any acquittance or not, if he have proof of the payment, he is ſecure enough from any ſecond payment, and if without payment he get an acquittance, it will not ſuffice, the infancy of him who makes the acquittance conſidered.

Beſides, if the acquittance be, as moſt uſually they are, but ſigned only with the name of the maker, and not ſealed, it is only an evidence or proof of payment, and no pleadable acquittance, becauſe no deed, ſo as it nothing differs from proof by witneſſes, ſave that it is not mortal as they.

But if the infant be under the age of diſcretion, what ſhall we ſay to a payment to him ſpecially, if he be but three, or four years old, or thereabout: here I think caution is to be uſed by the executor generally, and the ſureſt way is, if he fear to keep it in any reſpect, to pay it into the court, where it is recoverable, *viz.* where thewill was proved; yet the caſe may be ſo, as that this payment may not be at all ſafe for the executor.

As put the caſe that he entered into bond or ſtatute to pay all legacies by ſuch a day, to the ſeveral legatees; here I think the payment into the court ſpiritual ſufficeth not, for that muſt make the receipt to be with ſome charge, which is in ſome kind an abatement. There I think therefore, legally to ſecure the executor, the payment muſt be to or in the preſence of the guardian, becauſe of noriture, *viz.* him or her who hath (though not as guadian in reſpect of lands) the cuſtody or education of the infant.

But in caſe no bond nor other collateral penalty lie upon the executor, or in caſe the bond or ſtatute be only to perform the will generally, which nothing alters the courſe of payment, which by the will the law lays upon executors, then is not the executor put to any ſuch payment; nor need pay without demand, and acquittance, as in caſe of payment, upon a ſingle bill, or of rent-ſeck where no diſtreſs can be taken, nor other penalty incurred: yet in that caſe if demand be, and acquittance ready to be given, let the executor take heed, in caſe he be bound to performance, that he ſtand not upon the invalidity of the acquittance in reſpect of nonage, for, as I have ſaid, proof by witneſſes may ſupply a nullity of acquittance, and much more the weakneſs or imbecility, payment according to the teſtator's appointment, being the matter which acquitetth the payer, and this the executor may have teſtified under the hands of divers witneſſes, expreſſing circumſtances, ſo as all dying may continue ſafely from ſecond payment as well as an acquittance.—Herein courts of equity do often interpoſe helpfully for them who ſeek not evaſion from payment, but only ſecurity in paying.

Of Legacies.

Although theſe be not recoverable at and by the common-law, but moſt naturally at and by the law eccleſiaſtical, yet by ſuits in courts of equity, as the Chancery, and Court of Requeſts, they are often obtained, and of many things touching them the common law takes notice, and has manifold occaſions ſo to do: we will therefore conſider theſe parts or points.

Whether any legacy in certain and lying in *prender*, may be taken or had, without the executor's aſſent by the legatee, or him to whom it is bequeathed?

When an executor can, or ſafely may pay, deliver or aſſent to a legacy?

Whether one executor alone may do it, and what if the executor be an infant or woman covert?

What ſhall amount to an aſſent, of the executor, and what to a diſaſſent or diſablement of aſſent.

How a leaſe or chattel real may be given to one for a time, with remainder to another, and how not.

Where an aſſent to the firſt or one part of the bequeſt ſhall imply or amount to an aſſent for the reſidue.

Of the manner of aſſents, and therein of aſſents conditional.

What manner of intereſt he in the remainder of a leaſe after the death of another hath during the life of that other, and whether he may diſpoſe of it during that time, and how.

Whether this remainder can be defeated by any act of the deviſee for life, or by the death of him in remainder firſt.

By what acts or accidents a legacy may be forfeited or loſt, and therein of revocation, death before, *&c.*

Whether the executor's aſſent ſhall have relation to the teſtator's death, and ſhall make good a grant before made by the legatee.

As for the firſt, *Swinborne*, a learned civilian, ſays, that in caſe any goods be in the cuſtody of *I. S.* and the owner doth bequeath them to him,

him, then may he keep or retain them againſt the will of the executor, ſo as there be other ſufficient goods in the hands of the executor for payment of all debts.

But though this as it ſeems would it ſtand in the eccleſiaſtical law, yet for that no property is transferred to the legatee without the executor's aſſent, therefore doubtleſs the executor may at the common law recover the thing withheld, or damages to the value againſt the legatee detaining it.

Another caſe there is, wherein, as the learned civilian ſays, the legatee may take the thing to him bequeathed lying in *prender*, viz. a horſe, or other beaſt, or piece of plate, or other like thing known and in being, and that is where the teſtator doth expreſsly ſo appoint by his will.

But herein doubtleſs the common law, at and by the which debts are recoverable againſt executors, will oppoſe the law ſpiritual, for elſe by ſuch appointment the teſtator might cauſe that all his goods ſhould be taken by legatees, and that none ſhould remain to pay debts.

If there be other goods beſides ſufficient for payment of debts, then indeed I ſee not how the executor can hinder ſuch taking without violating his oath taken for performance of the will. If it ſhould be ſaid that it is alſo a breach of oath in the other caſe, it muſt be obſerved that that clauſe in the will being againſt the law is void, and conſequently there is a nullity upon it, and it is as if no ſuch thing were in the will, and ſo the oath extends not to it.

As a chattel ſhall not be transferred to a ſtranger, without the executor's aſſent, ſo if the deviſee be to the executor himſelf, till he elect to take as legatee, it ſhall be to him as executor.

As to the ſecond point, it may have theſe two parts:

Firſt, when the executor is able to give ſuch aſſent to a legacy.

Secondly, when he may do it with ſafety.

As to the firſt, he is able before probate of the will to aſſent unto the execution of a legacy, and that although he be not of full age of one and twenty years; but if he be under ſeventeen years, ſo as he is not able to take upon him the office of an executor, and therefore adminiſtration is during that time to be committed to ſome other; here his aſſent is not of force or effectual.

As to the ſecond part, till all debts be paid, the executor may not ſafely conſent that the legatee enter into the leaſe or chattel deviſed, no more

more than he may pay money bequeathed, if there be not ſufficient alſo to pay all debts.

As for the third point, *viz.* whether the aſſent of one executor, where there be many, be ſufficient, I ſee not how to doubt, ſince any one executor may give away any goods of the teſtator's, or releaſe any debts due to him, therefore much more aſſent, which is no more or greater work in effect, than an attornment of one leſſee upon a grant of a reverſion.

If there want to pay debts, he only who aſſented ſhall anſwer for it of his own goods, and not his companions.

If this executor be either under the age of 17 years, or under coverture, *viz.* a woman married, ſuch is not able to give a good aſſent to bind the others, no nor themſelves, for then thereby the infant might draw a debt upon himſelf, and the wife upon her huſband, by aſſenting to or paying of a legacy, there not being ſufficient goods to pay all debts.

The huſband's aſſent is ſufficient where the wife is executor, for his acts, whom ſhe hath choſen to be her head, may prejudice as well her as himſelf; yea though ſhe were within age, yet, he being of full age, his aſſent will ſtand good.

As to the fourth point, firſt there may be an aſſent and election implied, as well as expreſs, for if in the deviſe or bequeſt the legatee be appointed to do ſome act as in reſpect of the legacy, and the executor doth accept the performance thereof, this amounts to an aſſent.

If the deviſe be to an executor for the education of ſome children, which he doth accordingly educate; this makes an election to have the thing by way of legacy, and not as executor.

If an horſe be bequeathed, and one offering to buy him of the executor himſelf, he directs him to go and buy the horſe of the legatee; or if the executor himſelf offer money to the legatee for the horſe, this implies an aſſent that it ſhould be the legatee's by the will.

As to the fifth point, *viz.* in what manner a leaſe for years or other chattel real, may be bequeathed to one for a time, with remainder to another; it hath been much doubted, when a leaſe for years was bequeathed to one for life, whether the limiting of a remainder thereof after his deceaſe were of any validity in law or not? and this doubt had the following ground:—Any eſtate for life, in the judgment of law, is greater than any term for years; therefore when a termer hath by his will given his term, or his houſe or land,

which

which he ſo holds for years, to one for life, or for ſo many years as he ſhall live; this teſtator and deviſor hath not in the judgment of the law any eſtate remaining in him; and therefore it was thought very hard for him to give or limit a remainder to another.

After many arguings and debatings, it was in the reign of *Eliz.* reſolved, that ſuch a remainder was good, and that, if the firſt deviſee died before the term expired, then he to whom the remainder was limited, might enter and enjoy the reſidue of the term.

As for the giving of part of the years to one, and the reſidue to the other; *viz.* if the term being twenty years, the leſſee bequeaths ten thereof to his wife, and the remainder to his daughter.—Of this no doubt ever was, but that it was good; for that, after the firſt eſtate limited, there remained a further term, *viz.* ten years more in the deviſor, whereof he had power to diſpoſe; whereas in the other caſe, after the term limited to one for life, there remained but a poſſiblity that this life ſhould not take up the whole term.

Suppoſe that the termor deviſes or bequeaths the thing in leaſe to one child in tail, with remainder to another, and dies, and the firſt enters and dies without iſſue; now whether ſhall the next in remainder, or the executor of him ſo dying have the term reſidue? This caſe came in queſtion and was adjudged in the reign of King *John*, in the *Exchequer*, where *H.* holding by leaſe for years from the crown, the manor of *A.* in *Kent*, deviſed the ſame by his will to *A. H.* his eldeſt ſon, and the heirs male of his body, with remainder to *R. H.* another ſon in like manner, and the like remainder to *T. H.* and made the ſaid *A.* executor, who after his father's deceaſe elected to take as legatory, and after *R. H.* died leaving iſſue male, and making his wife executrix; *A.* not having iſſue male, granted the whole term by deed to *B.* and *C.* for the behoof of himſelf and his wife during their lives, and after to the uſe of his youngeſt daughter whom Sir *R. L.* married; then *A.* dying without iſſue male, the wife, and executrix of *R. H.* entred claiming the term, and being kept out ſealed a leaſe, whereupon an *eject. firmæ* was brought, and a jury appearing at the bar in the *Exchequer*, found a ſpecial verdict in effect *ut ſupra.*

In argument of this caſe, firſt the main queſtion was, whether this caſe were all one in law with the former, where a term was deviſed to one for life, with remainder over, ſo as by the death of *A. H.* without iſſue male, the term ſhould go to the next in remainder as in the other caſe by the death of the deviſee for life dying within the term it ſhould do.

On the plaintiff's part it was urged to be all one; ſo that by virtue of the bequeſts *ſupra*, *A.* had an eſtate to him, and his executors only, ſo long as there ſhould be heirs male of his body, and he dying

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without ſuch iſſue, the term remained to the executors of *R.* who had the remainder in like manner, and left iſſue male which ſtill lived, and ſo that ſeat of *R.* yet had continuance. For it was admitted by the counſel on that ſide, that the term could not go to the iſſue male of *R.* according to the words and intent of the will, ſince it was impoſſible to make a term to deſcend without an act of parliament.

This therefore they ſaid the law ſhould work, which was neareſt to the intent, *viz.* that after *A.*'s death, it ſhould go firſt to his executors and aſſignees, ſo long as iſſue male of his body doth continue, and for want of ſuch iſſue, then to *R.* his executors and aſſignees, ſo long as his iſſue male ſhould laſt, and therefore in this caſe, the iſſue male of *A.* failing, the executor of *R.* whoſe iſſue male failed not, ſhould enjoy the term, and ſo judgment ought to be given for the plaintiff, being leſſee of that executor.

On the other ſide, it was ſaid by the defendant's counſel, that this caſe differs much from the other caſe; where the term or land held by leaſe, is given but for life to the firſt, with remainder to another; which caſe, as having been often reſolved, was clearly admitted to be good law; for in that caſe the intent of the teſtator might and did take effect. But in this caſe, if the land ſhould go to the executors and aſſignees of *R. H.* it muſt go againſt the intent of the teſtator, whoſe mind and will was, as it appears by his word, that it ſhould go only to the iſſue male of one ſon after another, and not to any executors.

Now then ſince this intent was ſo contrary to the rules of law that it could not take effect, therefore it muſt be void; and ſo all the words of heirs male ſtanding void, the will is to be conſtrued as a ſole and abſolute giſt and bequeſt to the ſaid *A.* and conſequently the term muſt go his executors and aſſignees.

Next we are conſider of the manner of aſſents by executors; to this purpoſe we will conſider two ſorts of conditions, *viz.* precedent and ſubſequent.

As to the firſt, an executor may to a legatee abſolutely give aſſent upon a condition precedent, as thus:

I am content, that, if you can get and bring in to me, ſuch a bond wherein the teſtator ſtood bound unto *I. S.* then you enter upon the term, or take the corn or cattle to you bequeathed.

So of other like conditions which may precede the aſſent; as, if you can get the aſſent of my co-executor, or if you will pay the arrearages of rent to the leſſor behind at the teſtator's death, or if you will pay the wages already due to the ſervants attending about the cattle

cattle or corn to you bequeathed. In this caſe if the condition be not performed, there is no aſſent, and therefore the conditioning in this manner is good.

If it be upon a condition ſubſequent, as thus:

I do agree, that you ſhall have the thing bequeathed to you, provided that you ſhall pay ſo much yearly to me, or to ſuch a creditor of the teſtator: now the legatee entring into or taking the thing bequeathed, ſhall not loſe it again by failing to perform the condition afterwards, for the executor by his aſſent cannot make that legacy conditional which the teſtator gave abſolutely, no more than he can make that bequeſt to be abſolute which the teſtator gave conditionally, except by a releaſe made of the condition.

In the eighth place, touching the bequeſt of leaſes or chattels real, to conſider what manner of intereſt one to whom a remainder of a term after the death of another is limited, hath, and whether he may grant the ſame or diſpoſe thereof during the life of the firſt. And as to that it is clear, that he hath but a poſſibility of remainder, for that poſſibly the whole term may be ſpent in the life of the firſt, to whom during his or her life it is bequeathed, now a mere poſſibility is not grantable.

As to the ninth point, *viz.* to examine whether any act of the deviſee for life can fruſtrate or defeat him in the remainder of the term; and whether by the act of God, *viz.* the death of him in the remainder before the firſt deviſee for life ſhall defeat it.

As to the firſt, it hath divers times been reſolved, that no grant made by the firſt man cut off or defeat the ſecond, though formerly it were held otherwiſe; and as this cannot be done by direct grant or alienation, no more can it by an indirect or implied, as by taking of a new leaſe, which is a ſurrender in law of the old leaſe, no more than by an expreſs ſurrender. Nor doubtleſs by outlawry, whereby the term of the firſt deviſee is ſettled in the crown.

If we put the caſe further of waſte committed by the tenant for life, or breach of condition by non-payment of the rent or otherwiſe, theſe for the whole in the latter caſe, and for the part waſted in the former, do ſo deſtroy the leaſe, and put the reverſioner in *ſtatu quo prius*, as that all remainders muſt needs fail; ſo of a feoffment or other like forfeiture by fine.

Now we come to conſider of bequeſts perſonal, principally, how ſuch may be forfeited, loſt, or revoked, firſt then, we will conſider of the acts of the legatee; ſecondly, of the acts of God; thirdly, of the acts of the teſtator.

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The legatee, by the civil law, may forfeit his legacy by his miſcarriage towards the will; as if he uſe means to have it concealed and kept from being known, and conſequently proved.

Laſtly, if the legatee preſume too far upon the ſtrength of the bequeſt to him, ſo as he takes the thing bequeathed without the conſent of the executors.

In the next place let us ſee what acts of God ſhall cauſe a legacy not to take effect; firſt thus, if the legatee die before the teſtator, this legacy is loſt, and his executor ſhall not have it. So alſo if he die before the condition performed.

Let us come now to time of payment, and death before it. If there be a day certain limited for payment, and the legatee die before that day, his executor ſhall have the legacy; otherwiſe, if the payment were limited to be made when the legatee ſhould be married: but if it were only expreſſed to be towards the marriage of the legatee, and ſhe die before marriage, her executor ſhall have it.

Put the caſe that a legacy is bequeathed to *B.* to be paid when he ſhall be five and twenty years old, and *B.* dies before that age, it ſhall now be paid to the executor, and that preſently without ſtaying till *B.* ſhould have been of that age.

We will now ſpeak of the teſtator's own act, who clearly has power to revoke or countermand any legacy, though he revoke not the reſt of the will; and here firſt of revocation preſumed. If there fall out *graves inimicitiæ inter legantem & legatarium, legatum caducum efficitur; ſed non propter leves, & ſi graves, ſi tamen redeant ad amicitiam, reintegratur legatum*, that is, by grievous enmity after ariſing, and never reconciled, between the teſtator and legatee, the legacy is diſſolved, otherwiſe of a light breach or falling out, though it continue until the death of the teſtator.

Let us now conſider of a more expreſs revocation, and to that purpoſe will I relate a decree in *Chancery*, made by the Lord Keeper, according to the opinion of the Maſter of the Rolls, three judges, and two doctors, maſters of the court; between *R. E.* and *W. E.* complainants, and *H.* wife of *C. E.* their brother, and afterwards wife of Sir *F. W.* defendant. The caſe was thus:

The ſaid *C. E.* by his laſt will and teſtament gives and bequeaths to the ſaid *R. E.* his brother, 100*l.* and to the ſaid *W.* his brother, 1000*l.* and gives to the ſaid *H.* his wife all the reſidue of his eſtate, and makes and ordains the ſaid *H.* his ſole and only executrix, ſaving for the performance of his will, ordains *R. E.* and *W. E.* his ſaid brothers, whom he intreats to join as executors in truſt with his

wife, for the better performance of this his laſt will. Afterwards being ſick, of which ſickneſs he died, he was moved by Mr. *D.* and Mr. *S.* to ſettle his eſtate; to which motion he yielded, and Mr. *S.* and Mr. *D.* did demand of the ſaid *C.* what friend he thought fitteſt to be his executor, and to whom he would commit the care of diſcharging his funeral and performing his will, whether he truſted any perſon more than his wife, to be his executor? To whom he anſwered, that his wife was the fitteſt perſon for that purpoſe, and therefore ſhould be his ſole executrix, and then the teſtator was moved by Mr. *S.* to give and bequeath legacies to his father, to his brethren, and to his kindred; whereupon he anſwered, he would give or leave them nothing. And being further put in mind to remember his friends and others, gave and bequeathed to *L. A.* his god-child, twenty or thirty ſhillings; and being thereupon moved by his wife to give his ſaid god-ſon more, or a greater legacy, or the like in effect; ſaid, thou knoweſt not what thou doeſt, do not wrong thyſelf; twenty ſhillings, or thirty ſhillings, is money in a poor body's purſe; or the like in effect. The reſt he left to his wife's diſcretion or diſpoſition.

This will was proved by the oath of the ſaid *H.* and this codicil being pleaded as a revocation of the ſaid bequeſts:—The ſaid maſter of the rolls, judges and doctors, were by the lord keeper, and the order of the court, deſired to reduce the matter upon the will, and codicil, into a caſe, and to certify their opinions, whether the ſaid codicil were a revocation of the legacies given to the plaintiffs or not. And they, after counſel heard at ſeveral times, did finally reſolve with one unanimous conſent, that the legacies to the plaintiffs given, were not by the ſaid codicil revoked; and ſo certified under their hands.—Upon reading whereof the 25th of *November*, decree being reſolved to be made, if cauſe were not ſhewn to the contrary, the 27th of *November*, on which day the defendants counſel before the lord keeper, in the preſence of the maſter of the rolls, and the ſaid three judges, alledging what they could in ſtay of the ſaid decree: it was, by a general concurrence of opinion, decreed, that the legacies given to the ſaid plaintiffs, ſhould be to them paid, with intereſt for the detainment thereof.

Being now to conſider of relation in the executor's aſſent, it is proper that (ſince theſe diſcourſes are principally intended for thoſe who are not grounded ſtudents in or profeſſors of the law) we ſhew what we mean by relation, or what it is in law. Thus therefore is it conceived; that relation is a kind of fiction in law, making a thing done at one time to be accepted and reputed, or to have its operation as if it had been done at another time paſt.

For example; *A.* doth bargain and ſell freehold lands to *B.* in *Auguſt*, by indenture, which is not inrolled until *October* following,

yet this hath ſuch relation to the date of the indenture, that if *A.* after that, and before the inrolment, become bound in a ſtatute, or granted a rent-charge, or made a leaſe for years, or took a wife, or committed felony, yet ſhall none of theſe be of any force to charge or prejudice the eſtate of *B.* for that the law adjudgeth him owner by relation as from the time of the date: yea, if a ſervant departing in *Auguſt*, for ſome great breach with his maſter, doth kill his maſter in *October*, this is in law petty treaſon, as if he had continued ſervant when he did the fact; becauſe it relates to the malice conceived when he was his ſervant.

Having ſhewed that a term or other chattel real or perſonal, paſſes not, nor is transferred in property to the deviſee, until the aſſent of the executor be thereunto had; we will put the caſe that this aſſent is not had till a year or ſome ſuch ſpace after the teſtator's death, and make our queſtion, whether this ſhall have relation to the teſtator's death, *viz.* to be in the law's account as if it had then been. Or perhaps to ſome purpoſes ſo to ſtand, and to others not ſo. That this is uſeful and material to be known, be it thus ſhewn:

One bequeaths his term of tithes of an advowſon of an houſe or land, by him firſt leaſed to an under-tenant for rent, and dies in *May*, the executor aſſents to the bequeſt in *October*, between which two times tithes are ſet out, the church becomes void, and rent grows payable; now if this aſſent ſhall relate to the teſtator's death, the deviſee ſhall have theſe, elſe not; the like caſes may be put of the brood of cows, mares, and ewes fallen between the death of the teſtator and the aſſent, ſo alſo of fleeces, of ſheep ſhorn, *&c.*

To come to the point, it is reported by the Lord *Coke*, to have been held by *ſtat.* 41 *Eliz.* that this aſſent ſhall, as between the executor and the legatee, have relation to the teſtator's death, yet ſo that if the executor before his aſſent to the deviſee of a leaſe committed waſte; now the action of waſte ſhall be brought againſt the executor in the *tenuit*, for the waſte done before, and not againſt the deviſee in the *tenet*. But put the caſe that the legatee, before the executor's aſſent, granted the term to *I. S.* now, if to any purpoſe this aſſent ſhall have relation, it ſhall certainly ſo be to make good this grant, as making the legatee to be eſtated, and conſequently able to grant before the executor's aſſent.

Where a reverſion is granted by deed or fine, if the leſſee a good time after do attorn, this ſhall have no relation to the time of the grant; ſo as for waſte committed or rent grown due between the grant and attornment, the grantee can have no remedy. Therefore it is good for him who buys, or has any thing of the gift of a legatee, to have the aſſent of the executor, before the ſale or gift, well teſtified, or if the aſſent be not had till after, let him take a new gift, that he may not reſt in a doubtful caſe.

Divers Caſes of Bequeſts conſidered and expounded.

If a termor of an houſe bequeath his houſe to *B.* without expreſſing how long he ſhould have it, he ſhall have the whole term, and number of years. So of land.

Alſo, by the name of the houſe, the orchards, gardens, and backſides do paſs: yea if the houſe with the appurtenances be bequeathed thereby, the lands belonging to the houſe or uſed with it do paſs, tho' they would not ſo do by ſuch words in any leaſe, deed or grant, yet, by ſome civilians or canoniſts, the orchard belonging to an houſe ſhall not paſs by the only gift of the houſe, without ſome words ſhewing the intent of the teſtator ſo to be; or except one gate or door leads as well to the orchard as to the houſe; but ſome other of them hold, that it doth paſs without any ſuch help of circumſtance, ſo as it be adjoining to the houſe.

If a leſſee for years give his term by his will to *A.* he ſhall have it without paying any rent, for the executors ſhall pay it for him.

If one bequeath his indenture of leaſe, his whole eſtate in that leaſe paſſeth.

If one bequeath his obligation or other ſpecialty, the debt or duty itſelf ſhall go to the legatee; and by the canon or civil law the very action itſelf paſſeth, *viz.* as I conceive, ability to ſue the debtor in his own name: but in our law it is otherwiſe; the ſuit muſt be in the executor's name, for a debt or thing in action cannot be aſſigned, except by or to the King, and only at the common law is the debt recoverable; but the ſpiritual court may force the executor to ſue or let his name be uſed in the ſuit for and by the legatee.

If one bequeath all his moveables, debts due to him are not bequeathed, nor corn, nor fruit growing on the ground, nor ſtone, nor timber prepared for building, as the canoniſts and civilians hold.

On the other ſide, if one bequeath the moiety of all his goods, the legatee ſhall have only the moiety of that which remains after debts paid, for that only is to be accounted the teſtator's which he hath *ultra æs alienum.*

By a bequeſt of all utenſils or houſehold ſtuff, plate or jewels are not given.

If

If one bequeath to his wife all her apparel, ſhe ſhall not have, as ſome civilians ſay, her ornaments of gold or ſilver, by which is meant chains, jewels, bracelets, rings, &c. but others are of a contrary opinion, except they be ſuch things as are not lawful for her to wear.

If a bed be given by a will, *venit ornamentum ejus*, ſays the civilian, that is, the furniture thereof paſſeth, *viz.* not only the bed, bedſtead, bedcloaths, but alſo the curtains and valens.

If one bequeath to *A.* meat, drink, and cloathing, or *alimenta*, he ſhall have, ſaith the civil law, alſo lodging, habitation, and all things neceſſary for the maintenance of life, *viz.* fire and waſhing, &c.

If one bequeath to his daughter ten pounds a year for her apparelling, and ſhe demandeth none in four years, now ſhall ſhe not after that time have the arrearages.

If a man bequeath one of his horſes or cows, not naming which, to *I. S.* he is to chuſe which he will, ſo it be not the beſt of all, ſaith the civil law, and perhaps the mention of that exception grows out of reſpect to the heriot, which the lord ſhould have, or the mortuary which the parſon ſhould have.

If one bequeath to *I. S.* that which is another man's, and whereto the teſtator hath no right, then ought his executor to buy it, and give it to the legatee, or elſe ſatisy him to the full value, and this not only by the civil but alſo by the canon law.

If *A.* bequeath to *B.* ſuch an horſe by name, and after ſell away that horſe, and dies, now is his executor bound to anſwer the value thereof to *B.* and if the teſtator after his ſale of that horſe had bought another, and called him by the ſame name as the firſt, now ſhall this latter horſe paſs to *B.* except it can be proved that the teſtator ſold the former horſe of purpoſe to revoke his will touching that bequeſt.

A bequeſt is made of an hundred pounds to be paid at a future time, *viz.* divers years after the teſtator's death; a queſtion is made by the ſummiſt, whether the profit of the money in the mean time ſhall go to the legatee or the executor, and he reſolves with this difference, if the day were given in favour of the legatee being an infant, who could not ſafely receive it any ſooner, then he ſhall have the profit; but if the reſpite of payment were in favour of the executor, then ſhall the legatee have but the bare ſum without any addition of mean profits.

If one bequeath all his term or goods to his executor for payment of his debts, or debts and legacies, it is a void bequeſt, becauſe it is no more than the law would ſay, if he had ſaid nothing. So if it be generally to perform his will.

If

If one ſeized in fee-ſimple of land, bequeath it to his executor, to pay debts, the executor hath no ſtate of freehold; for if he ſhould, then it muſt be either for life, which might end by his quick death before debts paid, or in fee-ſimple, which would carry away the land for ever from the heir, where perhaps a few year's profits might ſuffice to ſatisfy the debts, yea, then by the death of the executor the land ſhould deſcend to his heir, and not go to his executor, who would be executor of the firſt teſtator.

If one give or grant all his goods, having leaſes for years as well as moveables, the leaſes ſhall not paſs.

If one will that his wife or any other ſhall have or hold, or enjoy the moiety of his leaſe with his executor. This implieth not that the executor have the other moiety as a legacy alſo, but otherwiſe as the law caſts it upon him, no more than where the moiety of fee-ſimple land is deviſed to the younger ſon, this ſhall not make the elder ſon to have the other moiety otherwiſe than by deſcent.

Of the Executor of an Executor.

The mediate executor in the fourth, fifth, or further degree, ſhould not, by the rules of the *common law*, ſtand in like plight executor to the firſt teſtator, as the firſt and immediate executor, as well as the heir, and aſſignee in the third or thirteenth degree is capable of all advantages in like ſort as the firſt and immediate heir and aſſignee.

We find in the time of *Edward* the ſecond, and *Edward* third, execution ſued out upon a judgment, and ſtatute by an executor of an executor, and why he might not as well maintain an action of debt, *&c.* I ſee not.

Conſiderations touching Payment of Debts, Legacies, and the Preferring or Reſpect of Perſons.

Firſt, where there is equality in the honeſty and conſcience of the debts; there, except in the ability of the parties to bear loſs, the diſproportion may otherwiſe occaſion, I think it would be moſt honeſt and juſt to pay every one proportionably, and to let the loſs of every one be equal: and the juſtneſs of this is taught by the law, which gives an *audita querela* for equal contibution in bearing of loſs by them who ſtand in equal degree.

The

The poverty and inability of ſome, and the plenty of others, may in *foro conſcientiæ* juſtify the paying more to one than another. For as the widow's mite was a greater gift, ſo a greater loſs than more out of abundance. Where charity finds or may find place or nearneſs to place of giving, it may find greater motives of preſerving from loſs.

The nature of the debts, and ſo ſometimes of legacies, may be ſo different, as thence may ſpring a juſt motive to diſproportion payments, to pay more to one than another, rate for rate, and ſo to ſuffer one to loſe more than another.

One debt may perhaps be, uſe for money; another may be money freely lent; another debt for land of inheritance bought; another for a leaſe, chattels or moveables, come to the executor. The firſt merits the leaſt reſpect, next the ſecond, then the third, and the laſt the moſt.

FINIS.

E. 4. 6896.